No. 07-1625

In The
Supreme Court of the United States

VALERIE MINER, DAVID MINER, ALEXANDER TUPAZ and LOURDES TUPAZ,

Petitioners,

v.

CLINTON COUNTY, NEW YORK, and JANET DUPREY, in her individual capacity and in her official capacity as Clinton County Treasurer.

Respondents.

On Petition for Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two questions presented involve the important constitutional issue of whether a local government can keep the surplus from a tax foreclosure sale when there has not been adequate notice and when the owner has had no opportunity to claim the surplus. The Decision by the Second Circuit creats a split between the Courts of Appeal and with state courts on these issues.

I. Did the decision of the Second Circuit allow the unlawful taking of private property by the government by property tax foreclosure without due process and equal protection? The Supreme Court holding in *Nelson v. City of New York*, 352 U.S. 103 (1956) *only* allows a profit over the amount of taxes owed when: 1) there is adequate notice of the tax foreclosure; 2) the state tax foreclosure law allows a property owner to make a claim for any profit realized at a tax foreclosure sale; and, in *dicta*, 3) there is a opportunity to redeem the property prior to the tax sale. In this case, the Petitioners were not allowed by Clinton County to make a claim for the surplus, were not given an opportunity to redeem prior to the tax sale (but after the default foreclosure order), and the Tupazes did not receive notice of the foreclosure action. In addition, the New York statute allowing local governments to keep the profit after a tax sale of private property violates equal protection of the law because in all private foreclosures, the property owner gets any excess money paid after the underlying debt is paid, while the government is allowed to keep the surplus after

a tax sale. Clinton County's predatory and aggressive taking foreclosures by default are unlawfully motivated by the wish to keep the equity in the property after the tax sale.

II. Did the decision of the Second Circuit conflict with the Supreme Court holding in *Jones v. Flowers* because Clinton County was on actual notice that the Tupazes did not sign for the certified letter containing the notice of foreclosure and Clinton County took no further reasonable measures to provide notice to them?

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The initial opinion of the United States Court of Appeals for the Second Circuit regarding Petitioners Alexander Tupaz and Valerie Tupaz is reported at *Elizabeth Luessenhop, Mark Baechle, Alexander Tupaz, and Lourdes Tupaz v. Clinton County, New York, William Bingel, Janet Duprey, Charles Johnson, Jr., and Town of Mendon,* 466 F.3d 259 (2d Cir. 2006) in that consolidated case

After remand of the Tupaz case, and denial on remand by the Northern District of New York, the United States Court of Appeals for the Second Circuit denied the instant consolidated appeal in *Valerie Miner, David Miner, Alexander Tupaz, and Lourdes Tupaz v. Clinton County, New York and Janet Duprey,* 541 F.3d 464 (2d Cir. 2008)(reproduced in Appendix A).

In *Clinton County v. Miner*, 39 A.D.3d 1015 (3d Dept. 2007), the New York appellate court refused to vacate the default judgment of tax foreclosure against the Miners for not asserting a meritorious defense, even though they asked to file an answer to assert the right to any surplus at the tax sale. (Reproduced in Appendix B).

JURISDICTION

The Court of Appeals entered its Decision on September 5, 2008 and denied the Petition for Rehearing November 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) to

review the Circuit Court's decision on a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . .be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, at Section 1, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

The fundamental constitutional questions in this case are: 1) Whether a local government can confiscate the owner's equity in real property when they sell it to pay back taxes at a tax auction when the owner is not given the opportunity to claim that surplus amount, and 2) Whether it is sufficient notice of a tax foreclosure when the county learns that the owners had *not* signed for the certified letter containing the foreclosure notice and takes no further measure to provide notice. Both of the Petitioners want to pay all of their unpaid taxes and have their former properties reconveyed to them. The Courts of Appeal and state courts are split on these important legal issues. To fully appreciate the significance of these constitutional violations by Clinton County, it is essential to consider the procedural history and the uncontroverted facts.

A. Procedural History

On October 11, 2006, the Second Circuit remanded *Tupaz v. Clinton County* to the District Court for a factual determination of whether Clinton County *thought* that the Tupazes had received the notice of tax foreclosure even though the certified mail receipt was not signed.

Luessenhop, Baechle, Tupaz v. Clinton County, et al., 466 F.3d 259 (2d Cir. 2006). On remand, the District Court held, among other things, that Clinton County could keep any surplus after tax sale and that Clinton County had provided sufficient notice of the foreclosure. *Tupaz v. Clinton County*, 499 F.S.2d 182 (N.D.N.Y. 2007).

In a separate District Court action, Valerie and David Miner challenged the tax foreclosure of their property by Clinton County. They had received notice of the foreclosure, but did not pay by the stated deadline. They filed a motion in the state court to reopen the default foreclosure judgment within the statutory time period. The Miners made a claim for the surplus from the tax sale and offered to pay all back taxes owed.

The New York Supreme Court and the Appellate Division held that the Miners did not have the right to claim the surplus at the tax sale by filing an answer. These courts also held that offering to redeem the property by paying all back taxes was not a meritorious basis to reopen the default judgment. By summary judgment, the United States District Court denied their claim, holding that they had no right to the surplus and were not denied due process. The Miners appealed to the Court of Appeals.

The Second Circuit Court consolidated these two Appeals. Both Appeals raised similar issues and were based upon similar facts. The Second Circuit denied the Appeals on September 5, 2008.

The Motion for Rehearing was denied on November 7, 2008.

B. Facts

1. Tupaz

Mr. and Mrs. Tupaz owned two contiguous undeveloped parcels in Plattsburgh, Clinton County, New York. The Town of Plattsburgh assessed these properties at a total of $60,000. The Tupazes owed $2347 in property taxes on these properties for 2002. It is uncontroverted that the U.S. Postal Service returned the green certified mail card for the notice of the tax foreclosure action to Clinton County *without a signature*. The return receipt card merely has a straight line drawn through the signature box. Although Clinton County admitted that the receipt had no signature, it took no further action to notify the Tupazes of the foreclosure.

Nothing further was done by Clinton County to determine whether the Tupazes had received the notice until April 21, 2003 (two months after the default judgment had been entered on February 16, 2003), when the Postal Service provided a letter to Clinton County stating that: "The following is in response to your 4/21/2004 request for delivery information on your Certified Item . . . . There is no delivery signature on file for this item" regarding the certified notice to the Tupazes. This was *after* the Tupazes asked to redeem their property for payment of back taxes in March 2003.

Neither Mr. nor Mrs. Mr. Tupaz ever received any notice of the tax foreclosure action. They never were notified of a certified letter from Clinton County. Nor did they ever sign for such a letter.

As soon as Mr. Tupaz learned that he and his wife faced foreclosure of their property, he offered all of the unpaid taxes to Clinton County. It is uncontroverted that Clinton County refused to accept payment of back taxes from the Tupazes in return for giving them back their property. They were never notified of an opportunity to make a claim for any profit on their property.

2. Miner

The Miners live in Vermont. They have owned a parcel of land in the Town of Saranac, Clinton County, New York since approximately 1983. It is valued at $18,900. The Miners owed a total of $1717.24 in unpaid property taxes, including interest and fees. Because of health problems and family emergencies, they did not pay their property taxes in 2005 prior to the redemption deadline. The county court entered default judgment of tax foreclosure against them.

The Miners timely moved to vacate and reopen the default judgment, pursuant to New York *Real Property Tax Law* § 1131. They asked to pay their taxes, interest, and penalties, and get their property back. They also asked for any profits from the tax sale. Clinton County refused to accept the back taxes from them. The county court denied

their motion to vacate and reopen, holding that they asserted no meritorious defense, even though they wanted to assert a claim for the surplus at the tax sale. This decision was upheld by the New York appellate court.

REASONS FOR GRANTING THE PETITION

I. IN *NELSON V. CITY OF NEW YORK*, THIS COURT HELD THAT A TAXING GOVERNMENT CAN *ONLY* KEEP THE PROFIT FROM A TAX FORECLOSURE SALE IF: 1) THERE HAS BEEN ADEQUATE NOTICE OF THE SEIZURE OF THE PRIVATE PROPERTY, *AND* 2) THAT THE OWNER HAD A ADEQUATE OPPORTUNITY TO MAKE A CLAIM FOR THE PROFIT. THIS DECISION CAUSES A SPLIT BETWEEN THE SECOND CIRCUIT AND STATE COURTS AND SETS A DANGEROUS PRECEDENT IN NOT ALLOWING A PERSON TO LAWFULLY CLAIM THE EQUITY OF THEIR PROPERTY.

In *Nelson v. City of New York*, 352 U.S. 103, 110 (1956), the Supreme Court held that New York City did *not* violate the Fourteenth Amendment by keeping the surplus [1] money after selling private

[1] The surplus is the amount of money received by the government at a tax sale over the amount of delinquent taxes, interest, and penalties. It represents the amount of equity of the owner in the property and represents a "profit" to the taxing entity.

property for unpaid water bills because "adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings" *and* because the New York statute at that time allowed the owner to obtain the surplus after the tax sale.

Nelson was based upon the specific facts of that case. New York City had provided *adequate* notice to the property owner of the foreclosure proceeding. There was *no* attempt by the owner to redeem *prior* to the tax sale. New York City had a statute allowing the property owner to *recover the surplus* by filing an answer asserting that the property had a value substantially exceeding the tax due. New York City had just passed a law allowing for the reconveyance to the original owner of property taken by foreclosure. The plaintiff [Nelson] had already applied for such reconveyance. [2] Based upon those specific facts, the Supreme Court held the statute to be constitutional: "[W]e do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale."

In *Matter of In Rem Tax Foreclosure Action No. 37*, 462 N.Y.S.2d 113, 114 (Sup.Ct. N.Y. Co.1983) the post-*Nelson* New York state court decision recognized: "Unquestionably, a taking of property of a value far in excess of a tax lien in

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[2] This *dicta*, regarding the right of reconveyance is essential to the actual holding in *Nelson*, because it assures that any profit is incidental to the foreclosure process, rather than being the driving motivation. The only constitutional purpose of tax foreclosure is to recoup unpaid property taxes.

satisfaction of the lien would constitute a violation of constitutional rights." The state court held that the New York City foreclosure law was not unconstitutional because, where substantial excess value is alleged, it allows a six-month delay in the foreclosure proceeding to permit the owner to sell the property, satisfy the lien, and keep the surplus value.

The purpose of the tax foreclosure laws is to ensure the collection of taxes, not to provide a profit for the taxing entities. *Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 32 (2d Dept. 1985). Under the New York foreclosure law, *private* mortgage holders *must* pay any surplus from a foreclosure sale into the court. That surplus over the amount owed on the mortgage is then distributed to the former owners (or lien holders). The foreclosing party cannot keep the surplus as profit. New York *Real Property Actions and Procedures Law* §§ 1361 and 1362.

The high courts of several states hold that it unlawful for a taxing governmental unit to retain surplus value of property sold at a tax sale under state law. In *Thomas v. Town of Croydon*, 761 A.2d 439 (N.H.2000), the New Hampshire Supreme Court held that it was unconstitutional under the New Hampshire Constitution for the state to retain the substantial surplus in a tax sale. It amounted to a taking without just compensation. The court held: "Because the right to property is a fundamental right in our State, all subsequent grants of power, including the taxing power, are

limited as to how they adversely affect it." Id. at 441.

In *Bogie v. Town of Barnet,* 270 A.2d 898, 900 (Vt. 1970), the Vermont Supreme Court provided, under the Vermont Constitution:

> To withhold the surplus from the owner would be to violate the . . . Constitution and to deprive him of his property without due process of law and to take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, *and applies for the surplus money,* he must receive at least that.

In *City of Anchorage v. Thomas,* 624 P.2d 271, 273 (Alas. 1981), the Alaska Supreme Court has also held that it is a manifest injustice for the state to take the surplus value of a person's property in a tax sale.

Both the Tupazes and Miners *want* to pay all of their back taxes, interest, and penalties. The Clinton County will suffer *no* prejudice or loss of taxes if it reconveys their former properties back to them. By refusing to do so, Clinton County shows the true purpose of its predatory foreclosure practices – to make a profit over the amount of back taxes owed. To pass constitutional muster, the government must *either* allow the owner to redeem up until the day of the sale *or* to recoup any surplus

over the amount of taxes, interest, and penalties owed. The whole foreclosure procedure is tainted by Clinton County's desire to profit from it.

Because Clinton County did not provide *actual* notice of the foreclosure to the Tupazes, it is not constitutionally allowed to keep *any* profit from the tax auction of their property. In the Miner case, the property owners did get notice of the foreclosure action. However, it is uncontroverted neither the Tupazes nor the Miners were given notice that they could file an answer to claim the surplus.

Further, the Miners tried filing a claim to recoup the surplus with the county court, which was rejected by that court. Also, they were not allowed to pay the back taxes or file an answer within the 30-day period to vacate and reopen the default judgment.

Private parties foreclosing on property cannot simply keep the surplus over the amount owed after the auction. It violates due process and equal protection for Clinton County to keep the surplus in a tax foreclosure, in clear violation of *Nelson v. New York City*. Clinton County's aggressive action in keeping the surplus from foreclosure also amounts to an unlawful seizure of private property and turning it into government property without due process or equal protection. There is a clear split between this Decision and the state court decisions holding that it is a

constitutional deprivation of property to be deprived of the equity in one's private property.

II. THE DECISION OF THE SECOND CIRCUIT VIOLATED *JONES V. FLOWERS* BECAUSE CLINTON COUNTY *KNEW* THAT THE TUPAZES HAD *NOT* SIGNED THE CERTIFIED RECEIPT FOR THE TAX FORECLOSURE NOTICE AND TOOK NO FURTHER MEASURES TO PROVIDE NOTICE. CLINTON COUNTY WAS MOTIVATED BY ITS DESIRE TO MAKE A PROFIT, RATHER THAN TO COLLECT UNPAID TAXES.

In *Jones v. Flowers,* 547 U.S. 220, 229 – 231 (2006), this Court held and explained:

> We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.[3] If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one

[3] In the instant case, Clinton County learned immediately upon receiving the unsigned certified receipt that it was likely that the Tupazes did not receive the foreclosure notice.

"desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. . . . This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." . . . Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

. . .

It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*. But if a feature of the State's chosen procedure is

> that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

This Court continued and explained:

> In response to the returned form *suggesting* that Jones had not received notice that he was about to lose his property, the State did--nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," . . . if there were no reasonable additional steps the government could have taken upon

> return of the unclaimed notice letter, it cannot be faulted for doing nothing.

Jones, at 234 (emphasis added). This Court then summarized the *Jones* decision by stating:

> There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner--taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

Jones, at 239.

In *Collette v. United States of America*, 247 Fed. Appx. 87, 88 (9th Cir. 2007), in a forfeiture case, the Court of Appeals held that when the government does not receive a "signed Green Card," it is on notice that certified mail has *not* been received and must make further attempts to serve the property owner.

In *Tu v. National Transportation Safety Board*, 470 F.3d 941, 946 (9th Cir. 2006), the Ninth Circuit construed and applied *Jones v. Flowers*. The FAA sent a letter suspending a pilot's license by certified mail. It was returned as unclaimed.

The FAA failed to re-send the letter by first class mail, even though it knew from past experience that only first class mail was received by the pilot. The court held that the FAA denied due process to the pilot:

> A reasonable agency actually desirous of notifying an individual of his right to be heard would not resort to a "mechanical adherence" to the minimum form of notice authorized by regulation in the very instance when timely notice is most crucial.

In *Rodriguez v. Drug Enforcement Administration,* 219 Fed. Appx. 22 (1st Cir. 2007), the First Circuit held that when the government knew "or had reason to know" that the certified notice would not reach the appellant, notice was inadequate.

Clinton County did not *promptly* attempt to re-serve the Tupazes when it learned that there was *no* signature on the certified receipt form. The lack of signature strongly *suggested* that the Tupazes had not received the foreclosure notice. The reasonable (and easy) thing to do would have been to remail it by ordinary first class mail. As this Court noted in *Jones*, the County promptly learned, *ex ante*, that its attempt to serve the Tupazes had not succeeded.

There was *no* evidence that Clinton County tried to confirm delivery *ex ante* until after Mr. Tupaz called them on March 31, 2004 to attempt to

pay his taxes.[4] This was over a month after the Default Judgment had been entered on February 20, 2004. Mrs. Duprey's own notes from the phone call on March 31, 2004 do not indicate that she had checked with the Post Office to confirm delivery at that time.

The documentary evidence, provided by Clinton County, conclusively indicates that it did not use the "Track & Confirm" service until April 21, 2004. It also indicates that on April 21, 2004 Clinton County learned conclusively from the Postal Service the Tupazes did *not* sign for the certified notice.

In *Mortgage Associates, Inc. v. Smith*, 1986 U.S.Dist.LEXIS 16907 (N.D.Ill. 1986), the court construed federal law requiring the use of certified mail as follows:

> This court interprets the C.F.R. provision as requiring a letter sent by certified mail in the usual way. "Certified Mail" is defined by *Webster's Seventh New Collegiate Dictionary* (7th ed. 1969) as "first class mail for which *proof* of delivery is secured . . . ."

(emphasis added). A *signed* receipt is the proof of delivery inherent in the definition of certified mail.

In *Taylor v. The Stanley Works*, 2002 U.S.Dist.LEXIS 26892, * 15 - * 16 (E.D. Tenn.2002), the plaintiff tried to effect service

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[4] The Track & Confirm Notice was dated April 21, 2004.

under the Federal Rules of Civil Procedure by certified mail. The court held there was no service because the certified receipt contained neither a delivery date nor the signature of any corporate officer or agent. Without this, there was no probative proof in the record that the certified letter was ever actually delivered. In *Moore v. Durham*, 240 F.2d 198, 199 (10th Cir. 1956), the court held that a "return receipt unsigned by the addressee was insufficient to effect valid *constructive* service." In *Fortney v. Petron, Inc.*, 1992 U.S.LEXIS 14860 (E.D.La. 1992), the court held that the return of an unsigned green return receipt card is not sufficient for service of a summons and complaint pursuant to FRCP 4(c)(2)(C)(ii). *See also*, *Winfield v. C & C Trucking*, 2003 U.S.Dist.LEXIS 12985 (S.D.N.Y. 2003)(under New York law, even if the receipt is signed, but that there is a question of *who* signed the return receipt, the court has the discretion to hold an evidentiary hearing on that question).

Further, under current Postal Service regulations (as of 1994), a *signed* receipt, with the *printed* name of the person receiving the certified letter, *is required* for certified delivery. *Chiadez v. Gonzalez*, 486 F.3d 1079, 1082, n. 3 (9th Cir. 2007)("Whether on a Postal Service delivery record or on a receipt returned to the sender, an illegible signature may compromise the value of the service for which the sender paid; the proposed new standard is designed to avoid that potential problem. Because most persons can provide a printed name that is more legible than their

handwritten signature, the Postal Service believes the former will be valuable to the sender in those instances when it becomes necessary to identify the person who received an accountable mailpiece.")

When mail is sent by certified mail the recipient *must* sign a PS Form 3849, November 1999, to get delivery. USPS Domestic Mail Manual, Sec. 42.1. This receipt has a line for the signature of the recipient, the printed name of the recipient, and the delivery address. *See, e.g., Mostan v. Commissioner of IRS*, T.C. Memo 1997-155 (U.S.T.C. 1997)(a signed Form 3849 is *the* official evidence that a person has signed for and received certified mail).

In the instant case, it is uncontroverted that the Tupazes did *not* sign a certified mail receipt. Clinton County *knew* that there was no signed receipt. It would have been easy for Clinton County to re-send the letter with the notice of foreclosure by first class mail when it learned the receipt was unsigned. Instead, *because they wanted to profit from the foreclosure sale,* it did nothing. This violates due process, as enunciated by this Court in *Jones v. Flowers.* As a matter of law, when the government knows that the certified receipt is unsigned (and that the Postal Service does not have a signed receipt), they must do more to pass constitutional muster. This is especially true, as here, where the stakes are so high for the property owner. There are no reported cases from any other Court of Appeals holding, as a matter of law, that

no further notice should be given when the certified mail receipt is returned to the sender unsigned.

CONCLUSION

The Decision of the Second Circuit allowing a government to seize private property for unpaid taxes and keep the owners equity has pernicious and far-reaching legal implications. The Decision causes a split between the Second Circuit and other circuit courts of appeal and state courts. Also, this case presents an issue of overwhelming importance, whether a government can seize the equity in private property without punctiliously complying with the Constitution and state laws. This Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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VALERIE MINER, DAVID MINER, ALEXANDER TUPAZ, AND LOURDES TUPAZ, Plaintiffs-Appellants, v. CLINTON COUNTY, NEW YORK, AND JANET DUPREY, IN HER INDIVIDUAL CAPACITY AND IN HER OFFICIAL CAPACITY AS CLINTON COUNTY TREASURER, Defendants-Appellees.

Docket Nos. 07-1625-cv (L); 07-2461-cv (CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

541 F.3d 464, 2008 U.S. App. LEXIS 18925

May 22, 2008, Argued
September 5, 2008, Decided

COUNSEL: MARK SCHNEIDER, Plattsburgh, NY, for plaintiffs-appellants.

ROBERT A. RAUSCH, Maynard, O'Connor, Smith & Catalinotto, LLP, Albany, NY, for defendants-appellees.

JUDGES: Before: CABRANES, KATZMANN, and B.D. PARKER, Circuit Judges.

OPINION BY: JOSE A. CABRANES

OPINION

[*466] JOSE A. CABRANES, *Circuit Judge:*

In two actions brought under *42 U.S.C. § 1983*, plaintiffs Alexander and Lourdes Tupaz and Valerie and David Miner allege violations of their rights to

due process and equal protection of the laws as a result of Clinton County's enforcement of various foreclosure provisions of New York's Real Property Tax Law. We consolidated their [*467] cases on appeal from the United States District Court for the Northern District of New York (Thomas J. McAvoy and Gary L. Sharpe, *Judges*) due to overlapping claims against the same defendants and now affirm the District Court's entries of judgment in favor of the defendants on all claims.

As explained in greater detail below, plaintiffs do not have a due process right to actual notice of foreclosure. They are entitled to notice that is reasonably calculated under the circumstances [**3] to reach the intended recipients, alert them to a pending foreclosure, and advise them of an opportunity to be heard. Clinton County did not violate plaintiffs' right to due process where, as here, the County sent a notice of foreclosure by certified mail and reasonably believed that the notice had been delivered. Plaintiffs were not entitled to additional notice of default judgment, to an additional opportunity to redeem their property after foreclosure, or to a share of any profits from a tax sale for the same reason: Clinton County provided plaintiffs with the process they were due by sending a notice of foreclosure that "was reasonably calculated to reach the intended recipient when sent." *Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)*. We also find no violation of the right to equal protection of the laws in the County's refusal to permit taxpayers to redeem their property by paying the back-taxes after default judgment has been entered or its refusal to grant plaintiffs a share of any surplus from a tax sale because plaintiffs have not submitted evidence

showing adverse treatment on an impermissible basis compared with persons who were similarly situated. Finally, we conclude that [**4] the County's requirement that long-overdue tax payments be submitted in the form of cash, money order, or certified check does not violate due process.

BACKGROUND

Unless otherwise stated, the following facts are not disputed.

The Tupazes

The Tupazes purchased two undeveloped properties in the Town of Plattsburgh, Clinton County, New York, in 1987. Since that time, these properties have been the subject of three tax foreclosure proceedings. The instant dispute arises from the alleged failure of defendants Clinton County and Janet Duprey, the Clinton County Treasurer, to give adequate notice of the foreclosure associated with unpaid property taxes from 2002.

Between May 2002 and February 2003, defendants sent five letters by first class mail to the Tupazes notifying them of their overdue taxes. *See Tupaz v. Clinton County, 499 F. Supp. 2d 182, 184 (N.D.N.Y. 2007).* The final letter, sent on February 11, 2003, warned the Tupazes that if their 2002 taxes were not paid by October 10, 2003, the County would initiate foreclosure proceedings. Each of the letters was addressed to the Tupazes at their home in Staten Island, New York--the address that appeared on record in the county tax rolls and [**5] where defendants had sent previous notices of foreclosure. *Id.* None of the letters were returned as un-

deliverable. *Id.* The Tupazes contend that they never received these letters, although they acknowledge that the County's record of their home address was correct.

Having received no response from the Tupazes, in October 2003, defendants included the Tupazes in a list of all delinquent taxpayers to whom they sent a Notice and Petition of Foreclosure (the "Notice" or "Notice of Foreclosure"), indicating that the final date for redemption of the property by paying the overdue taxes was January 16, 2004. *Id.* The [*468] Notice was sent to the Tupazes' Staten Island address via certified mail. [1] *Id.* Defendants subsequently received a delivery receipt for the Notice of Foreclosure, indicating that the letter was delivered on October 16. The delivery receipt did not contain a legible signature from the recipient indicating who received the package. Instead, the "Signature" box had a line drawn within it and did not otherwise contain a readily identifiable signature. In addition to the Notice, defendants published notice in two Clinton County newspapers pursuant to *New York Real Property Tax Law § 1124.* [**6] *Id.*

> 1 For the relevant time period, New York law required that only one notice be sent by certified mail. *See N.Y. Real Prop. Tax Law § 1125* (2005). The statute was subsequently amended to require that *two* notices of foreclosure be sent, either by certified mail and first class mail or both by certified mail. *See N.Y. Real Prop. Tax Law § 1125 (1)(b)* and *(5)* (2008).

While the parties dispute whether the Tupazes received the Notice, there is no dispute that defendants believed that it had been delivered. *See id. at*

185. Defendant Janet Duprey, the Clinton County Treasurer, attested that upon receiving the receipt, she presumed that "the mailing ha[d] indeed been delivered and received." *Id.* (quoting Affidavit of Janet L. Duprey ("Duprey Affidavit") P 14). Duprey further "assumed that the plaintiffs had indeed received the Notice" because they "had received numerous prior letters and warnings" at the same address. (Duprey Affidavit P 22.) She testified that, pursuant to standard practice for confirming illegible signatures, the County Treasurer's office confirmed, by checking the United States Postal Service website, that the Notice was delivered on October 16, 2003 within the zip code [**7] applicable to the Tupazes' residence. [2] After comparing the "signature" on the October 16 delivery receipt to previous delivery receipts for notices of foreclosure that had been sent to the Tupazes' Staten Island address, she concluded that previous notices had been accepted with equally indecipherable markings. According to Duprey, it was "not at all unusual to receive a certified mail receipt with an illegible signature or simply a mark in the signature box *indicating its receipt."* (Duprey Affidavit, P 14 (emphasis added).) She was not aware of any other factor that would have suggested a failure to deliver the Notice.

2 In her deposition testimony of August 2005, Duprey stated that she did not remember who checked the website or when exactly the website was checked in this case, but in her December 2006 affidavit she stated that someone in the County Treasurer's office checked the website "on th[e] same day [on which they re-

ceived the delivery receipt] or shortly therea ter." (Duprey Affidavit, P 13.)

The Tupazes did not pay the overdue taxes, r deem the property, or otherwise respond by the a pointed date, and the County initiated foreclosu proceedings in the County Court of Clinton [** County. On February 20, 2004, the County Court e tered a default judgment of foreclosure against t Tupazes as well as several other taxpayers who ha not redeemed their property. *Tupaz, 499 F. Supp. 2 at 186.* The County did not send the Tupazes a noti of judgment [3] and the Tupazes [*469] learned of t foreclosure in March 2004, when Mr. Tupaz calle the County Treasurer's office and was told that t County had foreclosed on the properties. *Id.* The T pazes contend that this call was the first time the learned that they owed taxes and that the Count had instituted foreclosure proceedings. Duprey a tested that, during this phone call, Mr. Tupaz admi ted that he had signed the October 2003 delivery r ceipt.

3 New York state law does not require suc notice. *New York Real Property Tax Law 1131* states:

> In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of all right, title, and interest and equity of redemption in and to the parcel in which the person has an interest and a judgment in foreclosure may be taken by default as

> provided by subdivision three of section eleven hundred thirty-six of [**9] this title. A motion to reopen any such default may not be brought later than one month after entry of the judgment.
>
> We have previously held that this provision does not require service of the default judgment of tax foreclosure in order to begin the thirty-day period within which a motion to reopen must be filed when the government has given notice of foreclosure. *See Weigner v. City of New York, 852 F.2d 646, 652 (2d Cir. 1988).*

Shortly thereafter, the Tupazes sought to vacate the foreclosure and set aside the default judgment in state court. After concluding that the Tupazes were properly served with notice of foreclosure and that their motion to reopen proceedings was time-barred under the applicable statute of limitations, the court denied their request in a decision which was subsequently affirmed on appeal. *See In re Foreclosure of Tax Liens by County of Clinton, 17 A.D.3d 914, 914-15, 793 N.Y.S.2d 596 (N.Y. App. Div. 3d Dep't 2005).*

The Tupazes then brought this *Section 1983* action in the United States District Court for the Northern District of New York, claiming that defendants' alleged failure to serve them with notice of the foreclosure deprived them of due process of law and that the state [**10] statute providing for personal notice of foreclosure is unconstitutional. The District Court (Thomas J. McAvoy, *Judge*) concluded that the Tax Injunction Act, *28 U.S.C. § 1341*, deprived it of subject matter jurisdiction over challenges to the en-

forcement of state tax law and, in the alternative, that the Notice of Foreclosure did not violate due process. The Tupazes then filed a timely appeal in our Court.

On appeal, we concluded that the District Court had subject matter jurisdiction to resolve the Tupazes' claims. *See Luessenhop v. Clinton County, 466 F.3d 259, 264-68 (2d Cir. 2006).* [4] We remanded the case for reconsideration of the Tupazes' due process claims in light of the Supreme Court's intervening decision in *Jones v. Flowers, 547 U.S. 220, 225, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)* (holding that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so"). *See Luessenhop, 466 F.3d at 271-72.* We ordered that, on remand, the District Court make a finding as to whether the County thought that the Notice of Foreclosure had failed to reach the Tupazes and, if [**11] so, whether their "failure to act is excused because [the first class] letters presumably had reached their desired destination." *Id. at 272.*

4 The other plaintiffs in the *Luessenhop* appeal, whose claims were previously consolidated with the Tupazes' in order to resolve a common question of subject matter jurisdiction, are not parties in this appeal. *See Luessenhop v. Clinton County, 466 F.3d 259, 262-64 (2d Cir. 2006).* The Miners, who are joint appellants in this appeal, were not parties in the *Luessenhop* appeal.

On remand, the District Court considered additional evidence and arguments, including the Duprey Affidavit, and granted summary judgment in favor of defendants. The Court determined that "[t]here is no evidence presented from which a reasonable fact finder could conclude that Defendants had any reason to believe that the Plaintiffs" had not received [*470] the Notice. *Tupaz, 499 F. Supp. 2d at 188.* The Court noted that neither the Notice nor the previous mailings had been returned. *Id.* It further reasoned that any suspicions about the line in the signature box were reasonably resolved by the confirmation on the Postal Service website. *Id.* Finally, the District Court observed that "there [**12] is no evidence that . . . anyone at Clinton County was aware of any facts before the final date of redemption that [the Tupazes] did not receive adequate notice." *Id. at 189.*

On that basis, the Court concluded that defendants had provided sufficient notice of the foreclosure to satisfy the requirements of due process. *Id. at 190.* The Court also concluded that *New York Real Property Tax Law § 1125*, which requires only certified mailing of a notice of foreclosure but does not require a return of the mail receipt, is consistent with the standard set forth in *Jones* for due process. *Id.* Citing our decision in *Weigner v. City of New York, 852 F.2d 646, 652 (2d Cir. 1988)* (concluding that due process does not require notice of the entry of foreclosure judgment where the property owner received notice of the foreclosure proceedings and an opportunity to respond), the Court rejected the Tupazes' challenge to the constitutionality of *New York Real Property Tax Law§ 1131. Tupaz, 499 F. Supp. 2d at 190.* The Court further concluded that neither

due process nor equal protection required that property owners be given a right to redeem their property after foreclosure. *Id. at 190-91.* In considering [**13] their claim that due process required they be given a right to any surplus proceeds obtained by the County in excess of the amount of taxes owed, the District Court ruled that the Tupazes lacked standing to bring this claim because the property had not yet been sold and the County had not yet obtained any surplus proceeds. *Id. at 192.* The Court also observed that, assuming that the Tupazes had standing, due process did not require that plaintiffs be afforded a right to any surplus. *Id.*

This appeal followed.

The Miners

It is undisputed that the Miners received notice of the foreclosure on their property also located in Clinton County. Defendants sent a notice of foreclosure in October 2005, indicating that the Miners were required to pay the overdue taxes from the previous two years by January 2006. The notice also stated that the only methods of acceptable payment were cash, money order, or certified check. The Miners did not pay the taxes by the due date and defendants initiated default proceedings in the County Court for Clinton County.

It is undisputed that, in March 2006, Mrs. Miner called the County Treasurer's office and was informed that default judgment had not been entered but [**14] was expected to be entered the next day. Mrs. Miner did not pay anything, and the County Court entered the order of foreclosure on March 10, 2006. The Miners subsequently sought to reopen the

foreclosure proceedings in order to vacate the judgment in County Court, but their request was denied. This decision was affirmed on appeal. *See Clinton County v. Miner, 39 A.D.3d 1015, 1015-16, 833 N.Y.S.2d 715 (N.Y. App. Div. 3d Dep't 2007)*

The Miners also filed a *Section 1983* action in the United States District Court for the Northern District of New York. They claimed that their rights of due process and equal protection require that the default judgment be vacated; that defendants should reconvey the property for full payment of the taxes owed; and that, if the property is not reconveyed, they should be permitted to retain any surplus obtained at a foreclosure sale of their [*471] property. They also argued that New York's Real Property Tax Law is unconstitutional to the extent that it does not permit vacatur of the judgment, reconveyance of the property, and the right to retain any surplus. Finally, they objected to defendants' refusal to accept a personal check as payment for overdue taxes.

In an oral ruling, the [**15] District Court (Gary L. Sharpe, *Judge)* granted defendants' motion for summary judgment.. The Court concluded that the County was under no legal or constitutional obligation to sell the property back to property owners after foreclosure. With respect to the Miners' claim that they should be allowed to recoup the surplus, the Court held that "[w]here adequate steps are taken to notify the owners . . . the county is not compelled to return the surplus from a tax sale." (Transcript of Miner Hearing, April 12, 2007, at 20.) Finally, the Court ruled that the County's requirement that delinquent taxes be paid by cash, money order, or certified check was constitutionally acceptable. This appeal followed.

DISCUSSION

As we have observed on many occasions, "[w]e review *de novo* a district court's grant of summary judgment." *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007).* Summary judgment is appropriate only if "there is no genuine issue as to any material fact." *Fed. R. Civ. P. 56(c).* "A fact is material when it might affect the outcome of the suit under governing law. An issue of fact is genuine if the evidence is such that a reasonable jury could [have] return[ed] a verdict [**16] for the [appellant]." *McCarthy, 482 F.3d at 202* (internal citations and quotation marks omitted). In reviewing the record, we "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." *Id.* (internal quotation marks omitted). Although the burden of demonstrating that no material fact exists lies with the moving party, "[u]nless the nonmoving party offers some hard evidence showing that its version of the events is not wholly fanciful, summary judgment is granted to the moving party." *Id.* (internal quotation marks and brackets omitted).

Notice of Foreclosure

The Tupazes contend that defendants knew or should have known that the Notice of Foreclosure did not reach the Tupazes and that, in light of that fact, defendants' failure to take additional steps to give notice was a violation of the Tupazes' right to due process pursuant to *Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).*

In the context of real estate foreclosures, due process does not require actual notice. *Dusenbery v. United States, 534 U.S. 161, 170, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002)*. Rather, the government must provide "notice reasonably calculated, under all the circumstances, to [**17] apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*. Indeed, "[t]he reasonableness and hence the constitutional validity of [the] chosen method [of notice] may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id. at 315*; *see also id.* ("[W]hen notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."). In *Jones*, in which a notice of foreclosure and a notice of tax sale were returned and stamped "unclaimed," the Supreme Court [*472] recognized that the government may have additional obligations "when the government becomes aware prior to the taking that its attempt at notice has failed." *547 U.S. at 227*. Accordingly, when the government has "promptly [acquired] additional information" that its notice of foreclosure failed to reach the intended recipient, *id. at 231*, it "must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id. at 225*; [**18] *see also id. at 229* (observing that, in such circumstances, "[n]o one 'desirous of actually informing' the owners" of the pending foreclosure and sale would "do nothing when a certified letter sent to the owner is returned unclaimed" (quoting *Mullane, 339 U.S. at 315*)). [5]

5 In *Jones*, the Arkansas Commissioner of State Lands sent a notice of foreclosure to Jones by certified mail after Jones had failed to pay his property taxes. *547 U.S. at 223*. Prior to the late payments that prompted the notice, Jones had no history of delinquent property tax payments. *Id.* No one was at Jones' home to sign for the notice of foreclosure when delivery was attempted, and the Postal Service ultimately returned the letter to the Commissioner as "unclaimed." *Id. at 224*. Two years later, Jones' property was scheduled for a tax sale. The Commissioner sent a notice of sale to the same address by certified mail; this notice was also returned as "unclaimed." *Id.* The Supreme Court likened these circumstances to a case in which "the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down [**19] a storm drain." *Id. at 229*.

The Tupazes interpret our statement in *Lussenhop* that the District Court was required to "ask . . . whether the County *thought* that the Tupazes had received notice," *466 F.3d at 272*, to require a finding of defendants' subjective intent. We now clarify that a District Court is required to examine whether a defendant's belief was objectively reasonable under the circumstances. *See Jones, 547 U.S. at 226* (requiring "notice reasonably calculated, under all the circumstances" (quoting *Mullane, 339 U.S. at 314*)).

The record in this case compels the conclusion that defendants reasonably believed that the Notice of Foreclosure reached the Tupazes. We agree with

the District Court that the Tupazes presented no evidence that "anyone at Clinton County was aware of any facts before the final date . . . that [the Tupazes] did not receive adequate notice." *Tupaz, 499 F. Supp. 2d at 189.* The Notice, which had been sent by certified mail, was never returned to defendants. *Cf. Jones, 547 U.S. at 224* (noting that two notices had been returned and stamped "unclaimed"). In addition, none of the previous letters sent by first class mail to the Tupazes' home in Staten Island had [**20] been returned, creating a presumption that they had been delivered to the correct address. *See Akey v. Clinton County, 375 F.3d 231, 235 (2d Cir. 2004)* ("Where . . . the County provides evidence that the notices of foreclosure were properly addressed and mailed in accordance with regular office procedures, it is entitled to a presumption that the notices were received."). Moreover, defendants reasonably relied on the certified mail delivery receipt which indicated that the Notice had been delivered. As the District Court determined, any suspicions about the line within the signature box were resolved by the confirmation on the Postal Service website, which "verifl[ied] that the certified mail had been delivered and received." *Tupaz, 499* [*473] *F. Supp. 2d at 188.* [6] Defendants also relied upon their previous dealings with the Tupazes and prior experience serving notice. The Tupazes, who had twice before been threatened with foreclosure, had responded to previous notices, for which delivery receipts had been returned with similarly illegible signatures. *Cf. Jones, 547 U.S. at 223* (noting that taxpayer had no history of delinquent property tax payments).

6 While the Tupazes dispute the fact that [**21] the defendants checked the website in October 2003, they have provided no "hard evidence" to support this dispute. *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007).* The Tupazes do not contest the assertion that the Postal Service website indicated that a delivery occurred. Instead, they contend that Duprey or someone from the County Treasurer's Office did not check the Postal Service's website in October 2003 as Duprey contends. To support this contention, the Tupazes point to a website printout obtained from defendants displaying a date stamp of April 21, 2004. They infer from the printout that defendants checked the website *only* after the default judgment, not when they received the delivery receipt.

We agree that the website printout shows that defendants checked the Postal Service website in April 2004, but we disagree that it proves they did not check the website in October 2003. To the contrary, Duprey testified at her deposition that whenever her office encountered a questionable signature, which happened with some regularity, it was a routine procedure to verify delivery on the Postal Service's website. Although she could not remember at her deposition when [**22] exactly this procedure had been undertaken in the Tupazes' case, Duprey clarified in her subsequent affidavit that the Postal Service website was checked "on that same day" her office received the Tupazes' delivery receipt "or shortly thereafter." (Duprey Affidavit P 13.) The April 21, 2004

> printout does not contradict Duprey's sworn recollection and the Tupazes have not come forth with any basis in the record to doubt Duprey's credibility.
>
> Accordingly, we find no error in the District Court's reliance on Duprey's affidavit in this regard.

The Tupazes argue that service by certified mail cannot satisfy the requirements of due process unless the delivery receipt is completed with an identifiable signature. We cannot agree. Although some courts have held the absence of a signature on a delivery receipt may defeat a presumption of delivery, *see, e.g., Moore v. Dunham, 240 F.2d 198, 199 (10th Cir. 1956)* (holding that, under Oklahoma law, an unsigned return receipt was insufficient to establish valid service), we can find no support for the proposition that the signature must be identifiable. Indeed, under the standard established in *Mullane* and reaffirmed in *Jones,* a reasonable person "desirous [**23] of actually informing" a taxpayer of a pending foreclosure would not require a legible signature where, as here, delivery was confirmed using other means. *Jones, 547 U.S. at 229* (quoting *Mullane, 339 U.S. at 315*). Defendants took the "additional reasonable steps," *Jones, 547 U.S. at 234,* of confirming the delivery on the Postal Service website and comparing the October 2003 delivery receipt to receipts from prior successful deliveries.

In the circumstances presented here, we agree with the District Court that Clinton County provided adequate notice to the Tupazes. Accordingly, there was no violation of the Tupazes' right to due process.

New York Real Property Tax Law § 1131

The Tupazes contend that *New York Real Property Tax Law § 1131* violates the constitutional guarantee of due process of law because it does not mandate service of notice of a default judgment of tax foreclosure where notice of foreclosure has been served. We rejected a similar claim in *Weigner v. New York, 852 F.2d 646, 652 (2d Cir. 1998)* and see no reason to reconsider that decision. The District [*474] Court properly relied on our holding in *Weigner* that "'due process only requires notice of the pendency of the action and [**24] an opportunity to respond' and does not require municipalities 'to send additional notices as each step in the foreclosure proceedings [is] completed.'" *Tupaz, 499 F. Supp. 2d at 190* (quoting *Weigner, 852 F.2d at 652*). We agree with the District Court. To the extent that the Tupazes argue that actual notice was required, we also reject that premise. *See Jones, 547 U.S. at 226* ("Due process does not require that a property owner receive actual notice before the government may take his property.").

Right to Redemption after Foreclosure Deadline

Both the Tupazes and the Miners argue that they were deprived of their rights to due process and equal protection because defendants did not permit a reasonable time for reconveyance after the default judgments were entered.

We agree with the District Court in both cases that defendants did not infringe on plaintiffs' rights to due process or equal protection by denying them rights of redemption after the default judgments were entered. Defendants provided plaintiffs ade-

quate notice of foreclosure and an opportunity to be heard, which is all that due process requires. *See Tupaz, 499 F. Supp. 2d at 191.* Once judgment was entered, plaintiffs lost their [**25] rights to the property under New York law and had no further right to redemption. *Id.; see also N.Y. Real Prop. Tax Law § 1131* (extinguishing "all right, title, and interest and equity of redemption" in a foreclosed property). We find no due process violation because defendants received adequate notice and an opportunity to be heard prior to the default judgment.

To maintain an equal protection claim, plaintiffs were required to show "adverse treatment of individuals compared with other similarly situated individuals [and that] such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Bizzarro v. Miranda, 394 F.3d 82, 86 (2d Cir. 2005)* (internal quotation marks omitted). Neither the Tupazes nor the Miners have shown that defendants treated them adversely compared with similarly situated property owners, nor have they shown that any adverse treatment was based on impermissible considerations. New York law expressly permits counties to establish a deadline for redemption and to reject offers of payment after that date. *See N.Y. Real Prop. Tax Law § 1110(1)* [**26] (limiting payment of tax lien to a period *"on or before* the expiration of the redemption period" (emphasis added)). The fact that other counties may allow redemption after judgment is insufficient to sustain an equal protection claim against Clinton County. We therefore agree with the two district judges that plaintiffs have not established vio-

lations of their rights to due process and equal protection.

Retention of Surplus From Tax Sale

The Tupazes and the Miners also seek redress for an alleged infringement of their rights to due process and equal protection because Clinton County will not allow them to retain the surplus proceeds from the tax sale, *i.e.,* the amount of the sale less unpaid taxes, fees, and penalties. In support of their equal protection claim, they also contend that Clinton County has engaged in "predatory foreclosure practices" in order to raise additional revenue.

[*475] The District Courts in both cases properly dismissed plaintiffs' claims for a share of any surplus. [7] The retention of any surplus from a tax auction is constitutional because there was no violation of plaintiffs' right to due process related to the notices of foreclosure. *See Nelson v. City of New York, 352 U.S. 103, 110, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956)* [**27] ("[N]othing in the Federal Constitution prevents [foreclosing on a property and retaining a surplus from a tax auction] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.").

7 It is likely that the Tupazes do not have standing because the Tupazes' properties have not been sold and there is no indication that a sale has occurred or is imminent, *see Tupaz, 499 F. Supp. 2d at 185.* However, we do not address this issue because we conclude that, even if the Tupazes had standing to bring this claim, there was no violation of their right to due process.

Regarding their equal protection claims, the record does not support a conclusion that Clinton County has discriminated against plaintiffs on an impermissible basis compared to similarly situated tax payers. *See Bizzarro, 394 F.3d at 86.* The evidence offered to show that the County harbored an impermissible, profit-driven motive is merely a recitation of the amounts retained in tax foreclosure proceedings in the last several years. Proof that the County routinely retains the surplus from tax sales--a practice which the Supreme Court approved over fifty years ago in *Nelson*--does [**28] not indicate a discriminatory intent.

Method of Payment

Finally, the Miners allege that their right to due process was impaired because defendants refused to accept a personal check as payment for the overdue taxes, allegedly in violation of *New York Real Property Tax Law § 1125.* The District Court rejected this claim without elaboration. (Transcript of Miner Hearing, at 20.) On appeal, the Miners rely on an opinion by the New York State Comptroller stating that "a town may not adopt a local law which permits its tax collecting officer to refuse to accept a personal check and requires that payment be made by certified check, money order or bank check." Office of the State Comptroller, Op. No. 87-34 (Apr. 30, 1987), 1987 N.Y. St. Comp. 53, 1987 N.Y. Comp. LEXIS 150. [8]

8 We are not aware that any court has addressed the Comptroller's opinion or analyzed the underlying issue in the twenty years since the opinion was issued.

Taken on its face, the Comptroller's opinion does not necessarily apply to a situation where, as in the Miners' case, a county permits payment by personal check for on-time payments but requires a certified check for late payments. [9] The statute cited by the Comptroller [**29] in support of his opinion does not provide any guidance on the permissible methods of payment for overdue property taxes. *See N.Y. Real Prop. Tax Law § 924* ("The collecting officer shall receive taxes at the times and places set forth in the notice of receipt of the tax roll and warrant and at any other time or place during usual business hours during the period of collection."). In addition, we are unaware of any provisions of New York law that expressly prohibit counties from establishing reasonable regulations for the collection of delinquent property taxes, although at least one provision permits a county to set a method of payment where a county acts as a tax [*476] collection agency and collects taxes in installments. *See N.Y. Real Prop. Tax Law § 973* (authorizing payment "in installments as provided in the local law enacted by the county").

> 9 We note that the Comptroller's opinion is addressed to "town[s]," not counties, but we need not address the legal significance this distinction may have, if any.

More important, the Miners have not explained how the prohibition of payment by personal check prevented them from paying their overdue taxes after they received the notice of foreclosure. [**30] The notice of foreclosure, which was sent in October 2005, stated the County's payment policy months in advance of the final date of redemption in January

2006 and the default judgment in March 2006. The Miners, who concede that they received this notice, had ample time to obtain a certified check or a money order but failed to pay their overdue taxes in *any* form. Under these circumstances, the Miners were not deprived of their right to due process.

CONCLUSION

For the reasons stated above, we **AFFIRM** the judgments of the District Court.

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY CLINTON COUNTY. CLINTON COUNTY, Respondent; and VALERIE MINER ET AL., Appellants.
501575.
Appellate Division of the Supreme Court of New York, Third Department.
Decided and Entered: April 12, 2007.

Appeal from an order of the County Court of Clinton County (McGill, J.), entered June 8, 2006, which denied respondents' motion to reopen a default judgment of tax foreclosure against them.

Mark A. Schneider, Plattsburgh, for appellants.

Maynard, O'Connor, Smith & Catalinotto, L.L.P., Albany (Robert Rausch of counsel), for respondent.

Before: Mercure, J.P., Peters, Mugglin and Kane, JJ.

MEMORANDUM AND ORDER

KANE, J.

On March 10, 2006, County Court issued a default judgment of foreclosure, pursuant to RPTL 1136, awarding petitioner possession of and title to respondents' real property based on their failure to pay taxes. On March 30, 2006, respondents moved to reopen pursuant to RPTL 1131. The court denied the motion, resulting in respondents' appeal. Although respondents timely moved to vacate the default judgment, we affirm because they failed to proffer an excuse for their default or a meritorious defense.

RPTL 1131 states that a motion to reopen a default judgment of foreclosure may not be brought later than one month after entry of the judgment, but it does not set forth the grounds that must support such a motion. We have previously held that even though CPLR 5015 contains a longer time period in which a party must

move for relief from a default judgment, the shorter time provision of RPTL 1131 applies to defaults in tax foreclosure proceedings (see CPLR 101; Matter of Foreclosure of Tax Liens by Clinton County [Zachary], 299 AD2d 709, 710 [2002], lvs dismissed 99 NY2d 610 [2003], 100 NY2d 574 [2003]). Notably, the one-month period was added to RPTL 1131 as a technical amendment and was intended merely as a timing device (see Mem of Div of Equalization and Assessment, Bill Jacket, L 1994, ch 532, at 5, 6, 14).

While it contains a specific timing provision, RPTL 1131 does not address the grounds for a motion to reopen a default judgment in tax foreclosure proceedings, making the grounds provisions of CPLR 5015 applicable (see CPLR 101). Respondents were therefore required to proffer a reasonable excuse for their default, as well as a meritorious defense (see CPLR 5015 [a] [1]; Guariglia v. Price Chopper Operating Co., 13 AD3d 1028, 1029 [2004]). As respondents' motion papers failed to establish any reasonable excuse or defense, the court properly denied the motion to reopen even though it was made within one month of entry of the judgment (see Matter of County of Herkimer [Jones], 34 AD3d 1327, 1328 [2006]).

We will not address respondents' arguments concerning alleged defects in the notice, as these arguments were raised for the first time in their reply brief on appeal (see Matter of Deuel v. Dalton, 33 AD3d 1158, 1159 [2006]).

Mercure, J.P., Peters and Mugglin, JJ., concur.

ORDERED that the order is affirmed, without costs.

No. 07-1025

In The
Supreme Court of the United States

VALERIE MINER, DAVID MINER, ALEXANDER TUPAZ and LOURDES TUPAZ,

Petitioners,

v.

CLINTON COUNTY, NEW YORK, and JANET DUPREY, in her individual capacity and in her official capacity as Clinton County Treasurer.

Respondents.

On Petition for Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL APPENDIX

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TABLE OF SUPPLEMENTAL APPENDICES

ALEXANDER TUPAZ and LOURDES TUPAZ, Plaintiffs, v. CLINTON COUNTY, NEW YORK, and JANET DUPREY, in her Individual Capacity and in her Official Capacity as Clinton County Treasurer, Defendants.

05-CV-606

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 41519

June 7, 2007, Decided
June 7, 2007, Filed

PRIOR HISTORY: *Luessenhop v. Clinton County, 466 F.3d 259, 2006 U.S. App. LEXIS 25367 (2d Cir. N.Y., 2006)*

COUNSEL: [*1] For Alexander Tupaz, Lourdes Tupaz, Plaintiffs: Mark A. Schneider, LEAD ATTORNEY, Office of Mark A. Schneider, Plattsburgh, NY.

For Clinton County, New York, Janet Duprey in her Individual Capacity and in her Official Capacity as Clinton County Treasurer, Defendants: Robert A. Rausch, LEAD ATTORNEY, Maynard, O'Connor Law Firm - Albany Office, Albany, NY.

For Clinton County, New York, Janet Duprey in her Individual Capacity and in her Official Capacity as Clinton County Treasurer, Counter Claimants: Robert A. Rausch, LEAD ATTORNEY, Maynard, O'Connor Law Firm - Albany Office, Albany, NY.

For Alexander Tupaz, Lourdes Tupaz, Counter Defendants: Mark A. Schneider, LEAD ATTORNEY, Office of Mark A. Schneider, Plattsburgh, NY.

JUDGES: Thomas J. McAvoy, Senior, U.S. District Judge.

OPINION BY: Thomas J. McAvoy

OPINION

DECISION & ORDER

I. INTRODUCTION

Plaintiffs commenced the instant action pursuant to *42 U.S.C. § 1983* claiming that they have been deprived of their real property without due process of law in violation of the *Fourteenth Amendment to the United States Constitution.* Plaintiffs also contend that *New York Real Property Tax Law §§ 1125* [*2] and *1131* are unconstitutional. After the Court dismissed the action on summary judgment, the United States Court of Appeals for the Second Circuit vacated the judgment and remanded for further proceedings. See *Luessenhop v. Clinton County, 466 F.3d 259 (2d Cir. 2006).* Presently before the Court are the parties' cross-motions for summary judgment.

II. BACKGROUND

Plaintiffs owned two adjacent vacant lots in Clinton County, New York. On May 21, 2002, May 31, 2002, August 8, 2002, January 1, 2003, and February 11, 2003, Clinton County ("the County") sent letters to Plaintiffs advising them that back taxes remained

due and owing and that foreclosure actions would be commenced if the taxes were not paid. These letters were sent, via first-class mail, to 4675 Amboy Road, Staten Island, New York, the address listed on the County's tax rolls. The letters were not returned as undeliverable, but the Tupazes did not respond. Plaintiffs do not recall receiving these letters.

"On October 10, 2003, the County sent Notices and Petitions of Foreclosure to all delinquent taxpayers, including the Tupazes, via certified mail . . . . These notices were intended to inform the [*3] Tupazes that the final date for redemption was January 16, 2004. Again, the Tupazes did not respond, prompting the County to proceed with the foreclosure." *Luessenhop, 466 F.3d at 263.* In addition to the notices sent to Plaintiff's by certified mail, the County published notice regarding the foreclosure in two Clinton County newspapers once a week for three non-consecutive weeks.

> The parties dispute whether the Notice of Foreclosure sent by certified mail actually was received. The County submitted a print-out from the United States Postal Service website confirming that the letter was delivered at 2:46 p.m. on October 16, 2003, and that a "line" was drawn through the signature section of the green certified mail receipt. The Tupazes claim that it was impossible for anyone at the Staten Island residence to have accepted the County's letter on October 16, 2003: the Tupazes were both working in Brooklyn that day and their adult son was away at Iona College in New Rochelle, NY. They

> further point out that the "line" drawn through the signature box of the return receipt is evidence that no one received the item of certified mail.

Luessenhop, 466 F.3d at 263.

[*4] Regardless of the parties' dispute regarding actual receipt of the October 10, 2003 Notice and Petition sent via certified mail, there is no genuine dispute as to Defendants' belief as to whether the Notice and Petition were delivered. In this regard, Defendant Janet Duprey, Clinton County Treasurer, submitted an affidavit attesting as follows:

> 11. In mid-October, 2003, the green certified mailing receipt attached to the Tupaz mailing was returned to my office with a mark in the signature line indicating that it had been delivered and received on October 16, 2003.
>
> 12. Pursuant to standard office procedure, when the receipt was returned, my staff would verify that it was indeed signed. When the Tupaz receipt was returned to my office, a staff member noted the line in the signature box and brought it to my attention. Based on my review of the receipt and the plaintiffs' history of non-payment, I determined that there was no reason to believe that it was not indeed received and acknowledged.
>
> 13. On that same day or shortly thereafter, we used the U.S. Post Office on-line "Track and Receive" service and verified it

had been delivered and received on October 16th at 2: [*5] 46 p.m. We rely upon the U.S. Post Office to deliver our mailings and assume that they actually deliver the mail we provide them. We have not had any prior problems with the Post Office that would cause me to suspect that they were not actually delivering the plaintiffs' mail.

14. In my experience, it is not at all unusual to receive a certified mail receipt with an illegible signature or simply a mark in the signature box indicating its receipt. I have found that often people simply mark a certified mail receipt, rather than signing it, and recall occasions when a receipt would have some unusual mark, and the recipient would later pay their taxes. When we receive just a detached receipt, rather than the entire envelope back, we assume that the mailing has indeed been delivered and received.

Duprey Aff. PP 11-14.

Although Plaintiffs proffer arguments in an attempt to raise questions of fact as to what Clinton County and Janet Duprey knew or should have known regarding delivery of the certified mailing, the arguments are not supported by the record. For instance, Plaintiffs claim that Defendants were notified by the U. S. Post Office that the Notice sent by certified mail [*6] might not have been delivered. There is no evidence of this. Rather, Defendants re-

ceived a marked certified mail receipt, and confirmation of delivery was provided by the U.S. Post Office's on-line "Track and Confirm" service. Defs.' Exs. J, K. Also, contrary to Plaintiffs' contention that the word "signature" was crossed out on the certified mail receipt card, the word is not crossed out on the certified mail receipt card. See Defs' Ex. S. In contrast to Plaintiffs' claim that Defendants received notice from the U.S. Post Office in April 2004 that the certified mailing was not delivered, the cited letter does not support this contention. Pls.' Ex. H. Rather, the cited letter provides in pertinent part: "The delivery record shows that this item was delivered on 10/16/2003 at 2:46 PM in Staten Island, NY 10312. There is no delivery signature on file for this item." Id. The lack of a delivery signature on file with the U.S. Post Office does not negate the fact that the confirmation of delivery card was returned to Clinton County. Defs.' Ex. S.

There is no dispute that Plaintiffs did not contact the County prior to the redemption deadline to inquire into the status of a foreclosure [*7] proceeding or to pay their back taxes. As a result, on February 20, 2004, a default judgment was entered transferring title of Plaintiffs' properties to Clinton County. Def. Local Rule 7.1(a)(3) Stat. of Mat. Facts Not in Dispute ("Def. L. R. 7.1(a)(3) Stat.") P 15. On or about March 31, 2004, Alexander Tupaz called the Clinton County Treasurer's office regarding the 2004 taxes. Tupaz was informed that title had passed to the County.

Thereafter, Plaintiffs moved in state court to vacate the foreclosure and set aside the default judgment. Plaintiffs' motion was denied on the grounds that: (1) Plaintiffs were properly served with notice

of foreclosure; (2) Plaintiffs failed to timely pay their taxes; and (3) their motion to reopen the default was late. Id. P 17. In addition, the state court "concluded that the County had properly served the plaintiffs at their correct address by certified mail and that no other additional return receipt was required." Id. This decision was affirmed on appeal. See *In re Foreclosure of Tax Liens by County of Clinton, 17 A.D.3d 914, 793 N.Y.S.2d 596 (3d Dep't 2005)*. This action followed.

On Defendants' original motion for summary [*8] judgment, the Court held that: (1) the Tax Injunction Act, *28 U.S.C. § 1341*, and the related principle of comity, deprived the Court of subject matter jurisdiction over the action; and (2) alternatively and assuming that the Court had subject matter jurisdiction over the matter, Plaintiffs were afforded all the process they were due. Accordingly, the Court granted summary judgment to Defendants and dismissed the action. Plaintiffs appealed.

On appeal, the United States Court of Appeals for the Second Circuit determined that (1) the Tax Injunction Act and the doctrine of comity did not divest the Court of subject matter jurisdiction, and (2) in light of the subsequently decided case of *Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed.2d 415 (2006)*, questions existed as to whether Plaintiffs were in fact afforded all the process they were due. See *Luessenhop, 466 F.3d at 268, 271-72*. The Second Circuit vacated the judgment and remanded the matter for further consideration in light of Jones. *Id. at 272*. Presently before the Court are the parties' cross-motions for summary judgment.

[*9]

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* When considering cross-motions for summary judgment, a court "'must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Hotel Employees & Rest. Employees Union, Local 100 of N.Y. v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002)*(quoting *Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993)).* "[N]either side is barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it . . . [and] a district court is not required to grant judgment as a matter of law for one side or the other." *Heublein, Inc., 996 F.2d at 1461.*

IV. DISCUSSION

a. Due Process - Adequate Notice

In Jones v. Flowers, the Supreme Court resolved the "conflict among the Circuits and State Supreme [*10] Courts concerning whether the *Due Process Clause* requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered." *Jones, 126 S. Ct. at 1713.* In that case, Jones, a property owner, was delinquent in paying his property taxes. *Id. at 1712-13.* The Arkansas Commissioner of State Lands ("Commissioner") determined to sell Jones' property in accordance with state law and, in an effort to notify Jones of the intended sale, sent by certified mail to Jones two notices of the sale. *Id. at 1712-18.* Both mailings were returned to the Commissioner marked

"unclaimed." Id. The Commissioner took no additional steps to notify Jones of the sale, and the property was sold to a third party. Id. Jones subsequently commenced a civil action asserting that the sale violated his right to due process because the notice provided by the Commissioner was constitutionally inadequate. Id. The Supreme Court agreed. Id.

The Jones Court reasoned that, in light of the fact that the two certified mailings were returned and marked undelivered, the Commissioner knew or should have know that Jones did not [*11] receive notice of the sale. *Jones, 126 S.Ct. at 1718.* The Court held that, in such circumstances, the *Due Process Clause* required the Commissioner to take additional reasonable measures in an attempt to notify Jones of the sale. Id.

It is important to note, however, that Jones did not hold that due process requires actual notice. See *Jones, 126 S. Ct. at 1713* ("Due process does not require that a property owner receive actual notice before the government may take his property.")(citing *Dusenbery v. United States, 534 U.S. 161, 170, 122 S. Ct. 694, 151 L. Ed.2d 597 (2002)).* Rather, Jones requires that a state or municipality make reasonable efforts to notify a landowner when it receives "new information" that the landowner had not received the sale notice sent to the address on file with the state or municipality. *Id. at 1718.* "What steps are reasonable in response to new information depends upon what the new information reveals. The return of the certified letter marked 'unclaimed' meant either that Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter [*12] at the

post office, or that Jones no longer resided at that address." Id.

> In Jones' case, the Court explained that there were at least two possible steps the Commissioner could have pursued. . . . First, the government could have (and should have) sent the notice by regular mail. [*Jones, 126 S.Ct. at 1718 -19*]; see also [*Harner v. County of Tioga, 5 N.Y.3d 136, 138, 800 N.Y.S.2d 112, 113, 833 N.E.2d 255 (2005)*] ("[D]ue process was satisfied in this case where the notices of foreclosure sent by certified mail ... were returned 'unclaimed,' but the ordinary mailings were not, and the County took no steps to obtain an alternative address."). Second, the Commissioner could have posted a notice on the front door of Jones' property. *Jones, 126 S.Ct. at 1719*

Luessenhop, 466 F.3d at 269-70.

The Commissioner was not required, however, to "search the Little Rock phonebook and other government records such as income tax rolls" for Jones' address because there was no evidence that he had moved and because state law required the land owner to keep his address up to date with the taxing authorities. [*13] See *Jones, 126 S.Ct. at 1719* ("An open-ended search for a new address-especially when the State obligates the taxpayer to keep his address updated with the tax collector, . . . imposes burdens on the State significantly greater than the several relatively easy options outlined above."). Further, the

Supreme Court noted that "if there were no reasonable additional steps . . . [the state] cannot be faulted for doing nothing." *Jones, 126 S.Ct. at 1718.*

In applying Jones to the instant case, the Second Circuit wrote:

> First, it is far from clear, under Jones, what weight should be given to [the Tupazes'] receipt of the first-class letters. It is at least arguable that if (i) the Tupazes did not receive the notice (sent by certified mail) informing them that the government was about to take their property, (ii) the government was aware that the letter was not received, and (iii) the government took no additional steps where it was practicable to do so, then the notice fails under Jones. It will be for the district court, in the first instance, to determine whether Jones suggests that the government's failure to act is excused [*14] because prior letters presumably had reached their desired destination.
>
> Second, the question that Jones tells us to ask is whether the County *thought* that the Tupazes had received notice. The record indicates that the County received conflicting information regarding the Tupazes' receipt of the notice: the postal service confirmed delivery, but there was no signature on the return receipt. The district court, having rendered decision prior to Jones, did not frame the question in this manner. It does appear that the court determined that the Tupazes must have

> received the letter, pointing out that "a certified letter that has been confirmed by the postal service to have been delivered to plaintiffs' proper address passes constitutional muster." But the court never made a specific finding regarding whether the County thought the Tupazes received the letter. This is a subtle but important distinction. Moreover, the question whether the County thought that the Tupazes had received the item of certified mail is a disputed question of fact, and each side should be permitted to marshal its evidence on this issue.

Luessenhop, 466 F.3d at 271-72 (emphasis [*15] in the original).

Both questions posed by the Second Circuit must be answered in Defendants' favor. There is no evidence presented from which a reasonable fact finder could conclude that Defendants had any reason to believe that the Plaintiffs did not receive all of the mailings it sent - including the certified mailing. The letters sent by first class regular mail were not returned, and the receipt for the certified mail was returned indicating that the Notice had been delivered. To the extent that the "line" drawn on the certified mail receipt raised some suspicion of non-delivery and, hence, created an additional obligation on the County's part, the County fulfilled this obligation by accessing the U.S. Post Office's online "Track and Receive" service and verifying that the certified mail had been delivered and received on October 16th at 2:46 p.m.

The questions raised by Plaintiffs as to the actual delivery of the certified mailing do not undermine Defendants' belief at the time the County extinguished the Tupazes' interest in the property that the certified letter had been properly delivered. See *Jones, 126 S. Ct. at 1715* (The court must "evaluate the adequacy [*16] of notice prior to the State extinguishing a property owner's interest in a home."); *id. at 1717* ("It is certainly true . . . that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante,* rather than *post hoc.*"). Simply put, assuming that the certified letter had not been improperly delivered, there is no evidence that Duprey or anyone at Clinton County was aware of any facts before the final date of redemption that Plaintiffs did not receive adequate notice. Given the uncontroverted evidence in this regard, and given that the Clinton County did make additional efforts to determine that the Notice had been delivered, the Court finds no due process violation. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' due process claim premised on an alleged lack of notice.

b. Constitutionality of N.Y.R.P.T.L. *§ 1125*

In their Third Claim for Relief, Plaintiffs seek a declaration that *New York Real Property Law § 1125* "violates the *Fifth* and *Fourteenth Amendments*" [1] because it requires notice of foreclosure to [*17] be served by certified mail but does not "require a signed certified mail receipt from the property owner as part of [the] certified mailing." Compl. P 53. Defendants argue that by delivering the foreclosure notice by certified mail to Plaintiffs' address on file

with the County, the County has satisfied both statutory and constitutional due process notice requirements. The Court agrees.

> 1 "The *Due Process Clause of the Fifth Amendment* prohibits the United States, as the *Due Process Clause of the Fourteenth Amendment* prohibits the States, from depriving any person of property without 'due process of law.'" *Dusenbery v. United States, 534 U.S. 161, 167, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002).* Since the United States is not a party to this action, the *Fifth Amendment's Due Process Clause* has no application in this case.

New York Real Property Tax Law § 1125 requires only certified mailing, not return of a signed certified mail receipt from the property owner. See [*18] N. Y. R. P. T. L. *§ 1125.* "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones, 126 S. Ct. at 1714* (quoting *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950)).* A certified mailing sent to the address that the landowner gives to the municipality is sufficient to satisfy due process. *Id. at 1713-14, 1714* ("It is true that this Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent."); *Dusenbery v. United States, 534 U.S. 161, 170, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002)*(certified mail sent to a known address satisfies due process); see also *Akey v. Clinton County, N.Y., 375 F.3d 231, 235 (2d Cir. 2004)* ("As notice by mail is deemed to be rea-

sonably calculated to reach property owners, the state is not required to go further, despite the slight risk that notice sent by ordinary mail might not be received."); *Weigner v. City of New York, 852 F.2d 646, 650 (2d Cir. 1988)* [*19] ("In the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process.")(citing cases). Therefore, Defendants are granted summary judgment dismissing Plaintiffs' Third Claim for Relief.

b. Constitutionality of N.Y.R.P.T.L. *§ 1131*

In their Fourth Claim for Relief, Plaintiffs contend that *New York Real Property Tax Law § 1131* is unconstitutional because (1) the statute requires "that a motion to vacate a default judgment of tax foreclosure be made within 30 days of the entry of default judgment," Compl. P 54; (2) "New York courts have construed this section to mean that Defendants did not have to serve the default judgment upon Plaintiffs to start the 30 day period to vacate," id. at P 55; and (3) "Plaintiffs had no notice of the foreclosure action or the foreclosure judgment. The statue is unconstitutional to the extent that Plaintiffs are not allowed to vacate the default judgment even though they had no notice of it, have a meritorious defense, and want to file their answer." Id. at P 56. Plaintiffs [*20] expand upon their argument in their Memorandum of Law, asserting:

> Plaintiffs agree with Defendants that the Real Property Tax Law does *not* mandate service of the default judgment of tax foreclosure. In Weigner, the Second Circuit held that default judgment did not

> have to be served *because* the owner was served with the notice of foreclosure. However, when an owner is not served with the notice of foreclosure and then is not served with the default judgment, they have *no* notice of the 30-day period to move to vacate the default judgment. *RPTL § 1131* states that a motion to vacate must be made within 30 days after *entry* of the default judgment.
>
> It violates due process under [the] *Fifth Amendment* to deprive a person of their property without any notice. If a county does not serve the notice of foreclosure, it *must* serve the default judgment. Otherwise, the owner is deprived of an opportunity to vacate the default judgment for good cause (including lack of notice or payment of the back taxes).

Pls. Mem. L. pp. 18-19 (footnote omitted, emphasis in original).

An identical argument was asserted by Plaintiffs' counsel in another case against [*21] Clinton County. See *Zachary v. Clinton County, N.Y., 2003 U.S. Dist. LEXIS 26596, 2003 WL 24197685, at *4 - *6 (N.D.N.Y. Jan. 10, 2003)*(Scullin, C.J.), aff'd *86 Fed. Appx. 451, 2004 WL 133865 (2d Cir. 2004)*("[W]e find no error in the actions of the district court and affirm for substantially the reasons given in its thorough opinion."). Then-Chief Judge Scullin rejected the argument, writing:

> With respect to the issue of whether the County had to serve the default judgment on Plaintiffs to satisfy due process, Weigner, as Plaintiffs acknowledge, controls and, under that case, due process does not require the County to serve the default judgment on Plaintiffs as long as the notice of the commencement of the foreclosure action is sufficient. Since the Court has already concluded that the notice Plaintiffs received was sufficient, Plaintiffs' argument that Weigner does not apply because the notice they received was insufficient to satisfy due process must fail.

*Zachary, 2003 U.S. Dist. LEXIS 26596, 2003 WL 24197685, at *6.*

Inasmuch as this Court has concluded that Plaintiffs received sufficient notice of the foreclosure, the Court rejects Plaintiffs' argument [*22] for the same reasons set forth by Judge Scullin in Zachary. Id.; see *Weigner, 852 F.2d at 652* ("[D]ue process only requires notice of the pendency of the action and an opportunity to respond" and does not require municipalities "to send additional notices as each step in the foreclosure proceedings [is] completed. . . .")(quotation marks and citations omitted). Accordingly, Defendants are granted summary judgment dismissing Plaintiffs' Fourth Claim for Relief.

c. Redemption After Deadline - Due Process and Equal Protection

Plaintiffs also contend that the County violated their constitutional rights to due process and equal

protection because it did not permit them to redeem their property after the property had been foreclosed upon. Pl. Mem. L. p. 15 ("Both due process and equal protection require a reasonable time for reconveyance of property to the owner after a default judgment of tax foreclosure is entered against them."). Both arguments are without merit.

As explained above, the courts have held that in tax foreclosure cases due process requires that the delinquent taxpayer be afforded adequate notice of the pendency of the foreclosure proceedings [*23] and an opportunity to present their objections. See *Jones, 126 S. Ct. at 1714; Weigner, 852 F.2d at 652.* Plaintiffs were provided constitutionally adequate notice of the pendency of the proceedings and the opportunity to present their objections. Once default judgment was entered, Plaintiffs' interest in the property was extinguished. See Miner v. Clinton County, N.Y., 06-CV-728 (N.D.N.Y.), Trans. of April 12, 2007 Proceedings, p. 19 [dkt. # 28] ("Here, the Miners tried to redeem after [the redemption period] had passed, however they had already lost their rights to the property."). [2] They had no further due process right to redeem their property after that point. Id. Simply put, Plaintiffs were provided all of the process they were due. *Jones, 126 S. Ct. at 1714; Weigner, 852 F.2d at 652.*

2 In Miner v. Clinton County, N.Y., 06-CV-726 (N.D.N.Y.), the Hon. Gary L. Sharpe, U.S.D.J., rejected an identical argument brought by Plaintiffs' counsel representing different clients against Clinton County. See Trans. of April 12, 2007 Proceedings, pp. 18-20.

[*24] Plaintiffs' equal protection argument is equally unavailing. The *Equal Protection Clause* "is basically a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*; see *Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005)*("The *Equal Protection Clause of the Fourteenth Amendment* requires that the government treat similarly situated persons alike.")(citations omitted). In order to prevail on an equal protection claim, Plaintiffs must establish that (1) they were treated differently than other similarly situated taxpayers, and (2) this differential treatment was motivated by an intent to discriminate on the basis of race, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person. *Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000)*. Although Plaintiffs cite to the practices in other municipalities that allow delinquent taxpayers to redeem their property after the redemption period or after entry of default judgment, a county is not required to permit redemption after the expiration of [*25] the redemption period. See N. Y. R. P. T. L. *§ 1131*; *Zachary, 2003 U.S. Dist. LEXIS 26596, 2003 WL 24197685, at *4*. Further and more importantly, Plaintiffs are unable to cite to any delinquent taxpayers in Clinton County that were treated differently than they were with regard to the right of redemption after entry of default judgment. Thus, their equal protection claim fails as a matter of law. See Miner, 4/12/07 Trans. pp. 18-19 (finding plaintiffs' equal protection claim meritless because plaintiffs "do [not] claim that they were treated differently from other delinquent taxpayers in Clinton County."). The claim is dismissed.

d. Right to Surplus Monies

Finally, Plaintiffs assert that the County is violating their "due process and equal protection rights under the Constitution by depriving them of the right to recoup any surplus obtained over the amount of delinquent taxes, interest, and penalties." Pls. Mem. L. p. 19. Defendants contend that the claim is not ripe for adjudication because Plaintiffs' property has not yet been sold and, if the claim is ripe, it is without merit. The Court agrees with Defendants.

Assuming *arguendo* that the issue is ripe for adjudication, [*26] see *Friends of Earth, Inc. v. Laidlaw Environmental Servs., Inc., 528 U.S. 167, 185-86, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (an actual case or controversy may exist under Article III where there is an imminent risk of injury), it is without merit. See *Zachary, 2003 U.S. Dist. LEXIS 26596, 2003 WL 24197685, at *6* (dismissing an identical claim). "[I]n [*Nelson v. City of N.Y., 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956)]*, the Supreme Court held that 'nothing in the Federal Constitution prevents [the City from foreclosing on real property and, in the absence of timely action to redeem or to recover any surplus, retaining the property or the entire proceeds of its sale] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.'" *Zachary, 2003 U.S. Dist. LEXIS 26596, 2003 WL 24197685, at *6* (quoting *Nelson, 352 U.S. at 109*). There is no legitimate reason not to apply *Nelson* to the facts of this case. Accordingly, Plaintiffs' claim for surplus monies is dismissed.

V. CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment is **GRANTED**, and the Plaintiffs' cross-motion for summary judgment is [*27] **DENIED**. The action is **DISMISSED** in its entirety.

IT IS SO ORDERED

DATED: June 7, 2007

Thomas J. McAvoy

Senior, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

VALERIE MINER and DAVID MINER,	)	
Plaintiffs,	)	
v.	)	**Docket No. 06-CV-0728**
CLINTON COUNTY, NEW YORK, and JANET DUPREY,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on THURSDAY, APRIL 12, 2007, before the HON. GARY L. SHARPE, United States District Judge.

THE COURT: All right. Thank you. My decision is as follows, and again I'm applying the summary judgment standard:

The Miners claim that both their due process and equal protection rights were violated by the county. They argue that these violations occurred because they were not permitted to satisfy their debt after the order of forfeiture was entered against them.

To state a claim for violation of due process, a plaintiff must allege that there was deprivation of

life, liberty or property without proper notice and an opportunity to be heard.

Due process requires that notice is reasonably calculated under the circumstances to apprise interested parties of the pendency of the action. In the context of a tax forfeiture, a property owner must be given notice of the proceedings before forfeiture can occur. That's Akey, A-K-E-Y, 375 F.3d 231, Second Circuit.

To establish a claim under the equal protection clause, the plaintiffs must show that they were selectively treated as compared with others similarly situated. That's Stevenson, 433 F. Supp. 2d 263. They must show that the selective treatment was based on impermissible considerations, including membership in a suspect class or the intent to inhibit or punish the exercise of a constitutionality right.

Here, there is absolutely no dispute that the Miners reached adequate notice by the county of the impending tax forfeiture proceeding, nor do they claim that they were treated differently from other delinquent taxpayers in Clinton County. Therefore, their due process and equal protection claims are meritless. They claim they should have been able to pay the debt after the forfeiture was entered, as is the case in some other New York counties. And that claim is without merit. The New York Real Property Tax Law on the rights of delinquent taxpayers is clear. The statue provides real property subject to a delinquent tax lien may be redeemed by payment to the enforcing officer on or before the expiration of the redemption period. Section 1110 (a).

Here, the Miners tried to redeem after that date had passed, however they had already lost their rights to the property.

1131 of the Property Law further provides: In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of all right, title and interest and equity of redemption in and to the parcel. Again, that's 1131.

Once the property has been foreclosed, the county is not legally obligated to sell the properties back to the plaintiff even if the plaintiff attempts to pay the taxes in full. Therefore, once the redemption period passed, the county treasurer was under no obligation to accept late payment of the debt, since the Miners were barred, foreclosed of their right to redeem.

The Miners also contend that the county should not be able to keep the surplus. Where adequate steps are taken to notify the owners of the charges in the foreclosure proceeding, the county is not compelled to return the surplus from a tax sale. See Luessenhop, 378 F. Supp. 2 d at 72, 73, citing Nelson. See also, Zachary, 2003 Westlaw 24197685, Judge Scullin's 2003 decision which was affirmed by the Second Circuit in 2004.

Furthermore, there's nothing unconstitutional nor does the Court see how the allegation fits within the context of the 1983 action in the first place about the county's position concerning the means by which payment can be made; namely, certified check,

money order, cash. The Court simply is not prepared to say that there is any violation of due process or equal protection of New York State's Real Property Laws as they currently exist in light of 1983 litigation. And in that regard, there is simply no claim here that's supported by the facts for a violation of due process or equal protection.

For those reasons, the defendant's motion for summary judgment is granted in toto, and the plaintiff' cross-motion is denied.

This constitutes my decision. No written decision will be forthcoming.

Anything further I can do for the parties?

MR. SCHNEIDER: No, your Honor.

THE COURT: Thank you very much.

MR. RAUSCH: No, your Honor.

(Court adjourned at 9:28 AM).

Bonnie J. Buckley, RPR
United States Court Reporter · NDNY

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(3)

No. 08-915

In The

Supreme Court of the United States

VALERIE MINER, DAVID MINER,
ALEXANDER TUPAZ and LOURDES TUPAZ,

Petitioners,

v.

CLINTON COUNTY, NEW YORK, and JANET DUPREY,
in her individual capacity and in her official capacity
as Clinton County Treasurer,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF FACTS

Respondents, Clinton County and Janet Duprey, submit this Brief in Opposition to the Petition for a Writ of Certiorari and submit that the Petition be denied in its entirety and that the Decision of the Second Circuit should not be disturbed.

Petitioner's Statement of Facts contains a number of misstatements and material omissions that must be addressed.

1. *Tupaz v. Clinton County*

The Tupazes owned two adjacent vacant properties in Clinton County and were delinquent in their obligation to pay their 2002 property taxes. Prior to the foreclosure in question, the Tupazes had been the subject of two foreclosure proceedings. As in this matter, the Tupazes denied receiving those notices, although signed certified mail receipts were returned on each occasion. The certified receipts from the prior foreclosures also contain illegible marks that the Tupazes deny are theirs.

Within the year prior to the foreclosure proceeding in question, the County mailed the Tupazes at least four separate notices advising them that they had not paid their taxes and warning them that a foreclosure action would be commenced if their taxes were not paid. Each letter was mailed to Tupazes' correct address and was not returned as undeliverable. The Tupazes admit receipt of a bill that

contained a "Notice of Arrears" statement, but maintain that they did not read it.

The Notice and Petition of Foreclosure in question was mailed to the Tupazes by certified mail, the means of notice required by New York State Real Property Tax Law § 1125. The Petition stated that the deadline for redemption was January 16, 2004, and that if they failed to pay their taxes or oppose the Petition by that date, they would lose their title to their property. There is no dispute that the address used by the County was the Tupazes' correct home address.

Records from the U.S. Postal Service reflect that the Notice and Petition was delivered to the Tupazes' address on October 16, 2003 at 2:46 p.m. An unknown person acknowledged receipt of the Notice by making a mark on the green receipt attached to the envelope. That signed green receipt card was returned to the Clinton County Treasurer's Office to confirm that the Petition had been delivered and received. Pursuant to Postal Service procedures, had the mailing been undeliverable or unclaimed, the entire Petition would have been returned; because only the receipt was returned, the County knew that delivery had taken place.

When that signed receipt was returned, the Treasurer's Office promptly checked the U.S. Post Office website and utilized the "Track and Confirm" service to confirm delivery. The County Treasurer has testified that a clerk in her office checked the Track

and Confirm service *immediately* after the receipt was returned, not, as suggested by Petitioners, several months later. The reference to "April 21, 2003" (Petition, pg. 5, 17) reflects only the date that the County *printed* the receipt, after the County learned that litigation would arise.

Because the Tupazes failed to oppose the Petition, a default judgment was entered in favor of the County on February 20, 2004. The Tupazes did not call the County to inquire into the foreclosure until March 31, 2004. The County Treasurer has testified that until that time, the County had no reason to question delivery and receipt of the Petition. Several months later, the Tupazes filed a motion in County Court to vacate the foreclosure. Their motion was denied as untimely and meritless. The Tupazes then appealed to the New York State Appellate Division, Third Department. The Appellate Division affirmed the County Court Decision. *Tupaz v. Clinton County*, 17 A.D.3d 914 (3d Dept. 2005).

The Tupazes then commenced the underlying action. In January, 2006, the Northern District Court of New York granted summary judgment in favor of the County and dismissed the Complaint in its entirety. The Tupazes then appealed to the U.S. Second Circuit Court of Appeals. Shortly thereafter, the U.S. Supreme Court rendered a Decision in the unrelated case of *Jones v. Flowers*, 547 U.S. 220 (2006), which addressed the constitutionality of an Arkansas foreclosure statute. In light of that Decision, the Second Circuit remanded this matter back to District Court

to evaluate whether its prior Decision was effected by *Jones*. In particular, the Second Circuit specifically directed the District Court to consider (1) the effect of the fact that the Tupazes had presumably received prior warning letters and (2) whether the County believed that the Tupazes had received the Notice. *Luessenhop/Tupaz v. Clinton County*, 466 F.3d 259 (2d Cir. 2006).

The parties each submitted proof to the District Court on the identified issues. In June, 2007, the District Court again granted judgment in favor of the County. The Tupazes appealed again to the Second Circuit, and consolidated that case with the matter of *Miner v. Clinton County*.

2. *Miner v. Clinton County*

The *Miner* action arises out of foreclosure of a vacant parcel of land in Clinton County, due to the Miners' failure to pay their 2004 and 2005 property taxes. The Miners were mailed *nine* warning letters and notices which reminded them of their delinquency and advised them that a foreclosure action would be commenced if the taxes remained unpaid. The Miners *admit* receipt of most of those notices, but did not pay their taxes or contact the County.

On October 7, 2005, Clinton County sent a Notice and Petition of Foreclosure to the Miners by certified mail. That Notice indicated that the redemption deadline was January 13, 2006, and that if they failed

to pay their taxes or oppose the Petition, they would lose their property.

There is no dispute that the Notice was mailed to the Miners' correct address and that it was *actually received* by Mrs. Miner. She has admitted that she signed the certified mail receipt and read and understood the Petition.

On the day that she received the Notice, Mrs. Miner called the Treasurers' Office to inquire into the amount of taxes due and the status of the foreclosure proceeding. She was again advised of the deadline and the risks of non-payment. Nonetheless, the Miners *still* failed to pay their taxes.

Mrs. Miner called the Treasurer's Office several times within the days immediately before that deadline. On each occasion, she was reminded of the deadline and advised that she would lose her property if her taxes were not paid. Nonetheless, the Miners *still* failed to pay their taxes. As a result, a default Judgment and Order of Foreclosure was entered in favor of the County.

Following the default judgment, the Miners moved to vacate the default Judgment. That motion was denied by Clinton County Court, upon the grounds that they had failed to demonstrate any excuse for their delay and default. The Miners then appealed that Decision to the New York State Appellate Division, Third Department. In April, 2007, the New York State Appellate Division affirmed the dismissal. *Clinton County v. Miner*, 39 A.D.3d 1015

(3d Dept. 2007). In addition, the Miners commenced an action in federal court. In April, 2007, the District Court dismissed that action as well. As noted above, the *Miner* Decision was then appealed to the Second Circuit in conjunction with *Tupaz*.

The consolidated *Tupaz* and *Miner* appeals were argued before the Second Circuit in May, 2008. In September, 2008, the Second Circuit affirmed the Decisions of the District Courts in both matters. *Miner/Tupaz v. Clinton County*, 541 F.3d 464 (2d Cir. 2008). The present appeal ensued.

The Petitioners' properties have not been offered at public auction and are being held by the County pending a final resolution of these matters.

REASONS FOR DECLINING TO GRANT THE PETITION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied in its entirety and that the Decision of the Second Circuit should stand. No compelling reasons exist to grant the Petition and hear this case. The issues which the Petitioners raise are not novel, unique, nor a subject which has caused prior conflict between the various Circuit Courts. The Second Circuit's **unanimous** Decision is *not* in conflict with a Decision from this Court or from any United States Court of Appeals. To the contrary, the Decision is entirely *consistent* with all relevant precedent and was premised upon well-settled principles of

law consistently applied and upheld by the courts. In addition, the Decision is fully supported by the facts established in the Record.

As a result, the Petition for a Writ of Certiorari should be denied.

POINT I

THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE CLAIMS FOR ANY SURPLUS LACK MERIT AND MUST BE DISMISSED.

The lower courts correctly concluded that the Petitioners lost all interest in their properties following their defaults and that they have no right to any surplus that the County might realize when the properties are auctioned.

At the onset, it should be noted that the neither party has *standing* to raise this particular issue. As correctly noted by the Second Circuit, "it is likely that the Tupazes do not have standing because the Tupazes' properties have not been sold and there is no indication that a sale has occurred or is imminent." (App. 20, fn. 7) To date, *neither* property has been offered at public auction. Therefore, the Petitioners lack standing to bring this premature claim.

In addition, this particular issue is not properly before the Court on the Tupazes' claim, because they did not raise this claim in their Responses to the County's Interrogatories.

Even if the Petitioners had standing to raise this issue, it must still be dismissed as meritless. The fact that a property *might* one day be sold for more than the amount of taxes due is irrelevant. A surplus or loss is simply incidental to the foreclosure process. There is no legitimate basis in the Record for the Petitioners to maintain that the County was "motivated" to profit off of foreclosures. When a surplus is realized, it does not somehow go into the coffers of the Treasurer's Office, but is used for the benefit of the County as a whole, by reducing taxes, making civic improvements, etc. A county frequently suffers a loss at auctions as well. On occasions when the property is auctioned for less than the delinquent taxes, a county certainly does not have a right to pursue the defaulting taxpayer to recover its *losses*. As a result, claims for surplus have consistently been rejected by state and federal courts.

The matter of *Nelson v. City of New York*, 352 U.S. 103 (1956) is dispositive of this issue. In *Nelson*, as in the present matter, a foreclosure action was commenced due to non-payment of taxes. Although those plaintiffs denied knowledge of the foreclosure, the proof reflected that notices were mailed to their correct address. Due to their failure to oppose the foreclosure action, a default judgment was entered in favor of the City. Under the New York City Administrative Code, if a delinquent taxpayer timely asserted an Answer in the action, he may have a claim to any subsequent surplus. The *Nelson* plaintiffs failed to do so and did not raise any claim until long after the

redemption deadline had expired. The plaintiffs filed a motion, claiming a constitutional right to the surplus. Their motion, and subsequent appeals, were denied by New York courts, and the issue was eventually certified for the U.S. Supreme Court.

The Supreme Court ultimately concluded that the plaintiffs had not demonstrated a violation of due process or equal protection and had no right to any surplus. In particular, the Court held, "What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows that adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings." *Nelson*, *supra* at 110.

That Decision has stood for fifty years and has consistently been upheld and applied. Generally, a taxpayer has an interest in any excess surplus from a foreclosure sale "only if the statue constitution or tax statute specifically creates such an interest." *Ritter v. Ross*, 558 N.W.2d 909, 912 (Wis. 1996). In *Ritter*, the Wisconsin Supreme Court relied upon *Nelson* and concluded that taxpayers were *not* entitled to recover any surplus – despite a "surplus" of over $17,000 – and held that, "when a state's constitution and tax codes are silent as the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action

meets due process requirements." *Ritter, supra* at 912.

The Supreme Court of New Hampshire has affirmed that same principle, concluding that, "In the absence of contrary provision by statute or constitution, a municipality's title to such property is absolute, so that a town is free from either legal or equitable claims by a taxpayer to any surplus realized." *Spurgias v. Morrissette*, 249 A.2d 685, 687 (N.H. 1969).

Similar language appears in *City of Auburn v. Mandarelli*, 320 A.2d 22, 32 (Maine 1974), *appeal dismissed*, 419 U.S. 810 (1974). The Supreme Judicial Court of Maine rejected a former landowner's claim to a surplus, concluding, "In the absence of contrary provision by statute or constitution, a municipality's title to property acquired under the tax-lien-mortgage-foreclosure statute is absolute, and the city or town has no power to part with, nor duty to account for, any surplus value on any theory of 'equity and good conscience.'" *Mandarelli*, *supra* at 32.

Similar results have been reached by courts in Massachusetts (*Kelly v. City of Boston*, 204 N.E.2d 123 (Mass. 1965)); Oregon (*Reinmeller v. Marion County, Oregon*, 2006 WL 2987707 (Ore. 2006)); and Texas (*Booty v. State*, 149 S.W.2d 216 (Tex. 1941)).

The New York State Court of Appeals has also addressed this issue in *Sheehan v. County of Suffolk*, 67 N.Y.2d 52 (1986), *cert. denied*, 478 U.S. 1006 (1978). In that case, the Court concluded, "There is no

unfairness, much less a deprivation of due process, in the county's retention of any surplus," noting that under the NY RPTL, the delinquent taxpayers had had several years to pay their taxes or sell the properties. *Sheehan*, *supra* at 59.

See also: *Luessenhop v. Clinton County*, 378 F.Supp.2d 63, 73 (N.D.N.Y. 2005), *rev'd and remanded on other grounds*, 466 F.3d 259 (2d Cir. 2006), *Izzo v. City of Syracuse*, fn. 6, 2000 WL 122014 (N.D.N.Y. 2000), *aff'd*, 11 Fed. Appx. 31 (2d Cir. 2001).

The cases cited by the plaintiff are quickly distinguishable. The matter of *Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439 (N.H. 2001) concluded that the particular "alternative tax lien" procedure in question violated the "takings clause" of the Constitution. Because that particular statute is dramatically different than the statute in question, and the plaintiff in this matter has not asserted a claim under "the takings clause," this case has no bearing. Both *Bogie v. Town of Barnet*, 270 A.2d 898 (Vt. 1970) and *City of Anchorage v. Thomas*, 624 P.2d 271 (Alaska 1981) concern statutes that specifically required that excess proceeds be returned to a taxpayer who properly moved for a surplus. Both cases are fact-specific and have no precedential value. Notably, *Bogie* makes no reference to *Nelson* at all, has not been positively cited by any federal court, and was specifically rejected by the Court of Appeal of Wisconsin in *Ritter*, *supra*. Similarly, in *Thomas*, the Alaska Supreme Court specifically noted that they

were *not* addressing her claims of due process, equal protection, or the issues raised in *Nelson*, *supra* at 274.

In contrast to those cases, the New York State Constitution and Real Property Tax Law does *not* provide defaulting taxpayers with an automatic right to recover any surplus realized. The Petitioners have not asserted any specific constitutional or statutory language that purport to provide them with that relief.

No New York statute specifically provides any interest or right in the surplus. To the contrary, New York provides a deadline by which the delinquent taxpayer loses all interest in the property. The New York State Real Property Tax Law mirrors the regulation at issue in *Nelson*. NY RPTL § 1110(1) provides that, "Real property subject to a delinquent tax lien shall be redeemed by payment to the enforcing officer, *on or before the expiration of the redemption period*, of the amount of the delinquent tax lien or liens, including all charges authorized by law." RPTL § 1131 further provides, "In the event of a failure to redeem or answer by any person having the right to redeem or answer, such person shall forever be barred and foreclosed of any right, title, and interest or equity of redemption in and to the parcel in which the person has an interest and a judgment of foreclosure may be taken by default as provided by § 1136(3) of this title. A motion to reopen any such default may not be brought later than one month after entry of the judgment."

To date, no court has ever held New York State's practice unconstitutional or declared that defaulting taxpayers always have an automatic constitutional right to recover a surplus. As in *Nelson*, these Petitioners were provided with notice of the foreclosure, were specifically advised of their deadline for redemption, and were provided with a statutory thirty-day deadline to move to reopen any default. The Tupazes failed to pay their taxes before the redemption deadline and did not move to vacate until ninety days after the Judgment had been entered. Although the Miners filed a motion within ninety days of the default judgment, that motion was properly denied by the County Court as they failed to demonstrate any merit for their claims or any excuse for their default.

Similarly, no claim for denial of equal protection exists. The proof reflected that Clinton County rejects *all* offers of late redemption and has not allowed *anyone* to share in any surplus realized. The Petitioners did not present any proof that any other county in New York State allows recovery of such a practice. The mere fact that a different statute regarding *private* mortgage foreclosures may allow for this certainly does not establish a claim of equal protection.

The Decision of the Circuit Court comports with *Nelson* and all applicable precedent. As in *Nelson*, *Ritter*, *Spurgias*, and *Mandarelli*, New York's laws are silent as to the distribution of the proceeds of any surplus. The Petitioners cannot rely upon any statute or constitutional language to claim to any surplus. In

addition, as noted below, the Petitioners received adequate notice of the foreclosure proceeding and ample opportunity to oppose it. Because they failed to do so, they lost any interest in the property or any claim of entitlement to any surplus realized. For the reasons set forth above, it is clear that the Decision of the Second Circuit was based upon accurate facts and case law and was in accord with all relevant precedent. Accordingly, the Court should decline to grant certiorari on this issue.

POINT II

THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE COUNTY SATISFIED ALL REQUIREMENTS OF DUE PROCESS BY DELIVERING A NOTICE TO THE TUPAZES' CORRECT ADDRESS BY CERTIFIED MAIL AND OBTAINING CONFIRMATION OF DELIVERY.[1]

By ensuring that the foreclosure notice was mailed to the Tupazes at their proper address and confirming that it had been delivered, the County has satisfied its due process obligations for provision of notice.

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[1] It should be noted that this issue pertains *only* to the Tupazes. The Miners have admitted receipt of the foreclosure Notice and acknowledge that they signed the certified mail receipt and read the foreclosure Notice in full.

The courts have consistently held that all due process requires is notice "*reasonably calculated* under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), *Jones v. Flowers*, 547 U.S. 220 (2006), *Weigner v. City of New York*, 852 F.2d 646 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989).

The courts have also concluded that due process does *not* require that a property owner receive actual notice before the government may take his property. *Jones*, *supra*, *Mullane*, *supra*, *Weigner*, *supra*. Notably, in *Weigner*, the Second Circuit held that, "The proper inquiry is whether the state acted *reasonably* in selecting means likely to inform persons affected, not whether each property owner actually received notice. As long as the state employs means 'such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish [that purpose],' *Mullane*, *supra* at 315, then it has discharged that burden. . . . Importantly, the state's obligation to use notice 'reasonably certain to inform those affected' does not mean that all risk of non-receipt must be eliminated." *Weigner*, *supra* at 649.

Therefore, the appropriate test is whether the County's methods were reasonably calculated to reach the intended recipient, *not* whether notice was actually received. *Jones*, *supra* at 226, *Mullane*, *supra* at 314, *Dusenbery v. United States*, 534 U.S. 161, 168-9 (2002). Were that not the case, a delinquent

taxpayer could defeat a foreclosure action simply by denying notice. Clearly, an otherwise valid foreclosure action should not be so easily frustrated.

Although the Petitioners rely heavily upon *Jones v. Flowers*, *supra*, it is questionable whether *Jones* even applies to this case. At most, *Jones* only concerns the State's obligation when a foreclosure Notice is returned as "unclaimed" and the State learns that its attempt at notice has *failed*. In *Jones*, the Supreme Court stressed that they were not deviating from well-settled principles of notice established in *Mullane*, *supra*, and *Dusenbery v. U.S.*, 534 U.S. 161 (2002). *Jones, supra* at 238. In *Jones*, the Supreme Court found a denial of due process only because the State did nothing further after learning that the Notice had been returned.

In the present matter, the Notice was not returned, and the County received *confirmation* of delivery, *not* notice that delivery had failed. Under standard Postal Service procedures, if the foreclosure Notice is unclaimed or undeliverable, the entire Petition would have been returned to the County, bearing such a marking. The return of the receipt alone reflected that delivery had taken place. That receipt also contained a mark in the signature line, not dissimilar to the illegible scrawls on the Tupazes' prior foreclosure receipts. Finally, the County checked the Postal Service "Track and Confirm" website and received confirmation of the specific date and time of delivery. The first time the County learned that there was some question about delivery was when Mr.

Tupaz called the County for the first time, more than one month after the foreclosure had taken place. Unlike *Jones*, this is not a matter where the County learned that its efforts at providing notice had *failed*; to the contrary, the County learned that its efforts had **succeeded**.

The *Jones* Court concluded that "the constitutionality of a particular procedure for notice is assessed *ex ante,* rather than *post hoc*." *Jones, supra* at 231. The Court went on to hold that, "if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure." *Jones, supra* at 231.

Thus, the Second Circuit correctly determined that the focus in this case was "whether the County *thought* that the Tupazes had received notice." *Luessenhop/Tupaz v. Clinton County*, 466 F.3d 259 (2d Cir. 2006). In doing so, this Court correctly acknowledged that the focus is upon the *sender*, not the recipient, and whether the *sender* reasonably believed that its efforts at delivery were successful. Upon remand, the County presented Affidavits and testimony from the Treasurer regarding the steps that they took to verify delivery and confirming that the County was not aware of any evidence to suggest that it was not, in fact, received. Following the remand, the Second Circuit correctly noted that the Treasurer

was not aware of any other factor that might have suggested a failure to receive the Notice. *Miner/Tupaz v. Clinton County*, 541 F.3d 464, 468 (2d Cir. 2008). The Tupazes presented no proof to the contrary, other than to again echo their own conclusory denials of receipt. There is still simply *no evidence* that the Notice was not, in fact, received. Thus, the Second Circuit properly concluded that despite the Petitioners' denial of notice, "there is *no dispute* that defendants believed that it had been delivered." *Miner/Tupaz*, *supra* at 468.

Once the Notice was delivered to the correct address pursuant to standard office procedures, the County received back a receipt, and the County had verified delivery through the Postal Service, the County was under no obligation to do anything further.[2] Since *Jones*, courts have consistently upheld notice, despite a plaintiff's denial of receipt, where the sender receives confirmation of receipt.

In *Centeno v. U.S.*, 2006 WL 2382529 (S.D.N.Y. 2006), a seizure notice was sent to a prisoner by certified mail. Although the government received a receipt signed by someone at the facility, the plaintiff apparently denied receipt. This Court concluded that notice was sufficient and that no further notice was

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[2] Several cases have supported the use of the USPS "Track and Confirm Service" to prove sufficient notice. See: *Griggs v. JP Morgan Chase*, 2007 WL 43781 (S.D. Tex. 2007), *Blomeyer v. Levinson*, 2006 WL 463503 (E.D. Pa. 2006).

required, since the government did receive proof of receipt and never received any information that the plaintiff *hadn't* received it.

In *United States v. Sodders*, 2006 WL 1765414 (N.D. Ind. 2006), notice of acceleration of a loan was served by certified mail and signed for by the plaintiff's husband. She later claimed that she did not receive the notice and that her husband was not authorized to accept it. The Court noted that actual receipt was irrelevant, and that since the government received proof of receipt, due process had been satisfied.

The matter of *Estate of Riley*, 847 N.E.2d 22 (Ohio 4th Dist. 2006) specifically concerned the issue of an unsigned certified mail receipt. The proof reflected that a probate court notice was sent to the plaintiff by certified mail. Several days later, the green return receipt was returned without a signature, but bearing a stamp showing the date of delivery. Post Office records reflected the date of delivery. The Post Office was ultimately able to locate a separate receipt signed by plaintiff's son. Although the plaintiff denied receipt and maintained that her son lacked authority to sign for her mail, the court determined that considering the circumstances, notice was sufficient. Significantly, the court noted that, to the extent that the Post Office failed to follow its own internal procedures for certified mail, "that is the misfeasance of the Post Office, not the (sender)." *Id.* at 28.

The cases cited by the plaintiff are quickly distinguishable. The case of *Collette v. United States*, 247 Fed. Appx. 87 (9th Cir. 2007), concerned numerous notices of administrative forfeiture sent by the DEA. The Court found notice deficient due to a number of problems, including return of several notices as undeliverable, and return of one unsigned receipt. The Court's concerns were based upon the extensive deficiencies, *not* the single unsigned card. That same extent of alleged deficiencies does not exist in the present matter.

Similarly, in *Tu v. National Transportation Safety Board*, 470 F.3d 941 (9th Cir. 2006), the proof reflected a long and extensive history of returned and unclaimed certified mailings. The court held that notice was insufficient because, based upon that past history, the FAA should have known that Tu only accepted first-class mail. Once again, that history does not exist in the present case. The County had no reason to believe that Tupaz would not receive certified mail. In contrast, as noted above, in prior foreclosures, someone at the plaintiff's residence had signed and returned certified mail receipts.

Similarly, in *Rodriguez v. DEA*, 219 Fed. Appx. 22 (1st Cir. 2007), notice was rejected because the government knew that the plaintiff was incarcerated and had recently signed for other mail at another prison.

As near as can be determined, *no court* of any jurisdiction has held that due process requires that a certified mail receipt must be signed in order to

satisfy due process. Similarly, *no court* has required that notice must be remailed when a sender receives an unsigned certified mail receipt or, as here, when a sender receives *confirmation* of delivery.

The following cases cited by the Petitioners do not stand for the proposition that a *signed* receipt is required in order to establish due process. *Taylor v. The Stanley Works*, 2002 WL 32058966 (E.D. Tenn. 2002) (Notice rejected because there the receipt was returned without any date or signature, and the Post Office was unable to identify the date of delivery); *Moore v. Dunham*, 240 F.2d 198 (10th Cir. 1956) (Notice under the Oklahoma Non-Resident Motorist Act rejected where no return receipt was received at all); *Fortney v. Petron*, 1992 WL 266191 (E.D. La. 1992) (regarding former FRCP 4(c)(2)(C)(ii), which specifically required a signed acknowledgment of receipt); *Winfield v. C&C Trucking*, 2003 WL 21749610 (S.D.N.Y. 2003) (concerning New York Vehicle and Traffic Law § 253, which specifically required a signed receipt); *Chiadez v. Gonzales*, 486 F.3d 1079 (9th Cir. 2007) (regarding a statute that specifically required that an Order to Show Cause for an immigration hearing must be signed for by the recipient.) In contrast to the cases cited by Petitioners, the New York Real Property Tax Law does not contain a requirement that the return receipt be signed.

In contrast to the Petitioners' claims, the "Form 3849" is *not* a required form, and does not even apply in this case. That is merely the form the mail carrier leaves to advise a recipient who is not at home that

they attempted delivery of a certified article and that it can be redelivered or retrieved at the Post Office.

In contrast to the Tupazes' arguments, due process does *not* require a signature on the certified mail receipt. Were that the case, one could escape any foreclosure – or *any* matter of any kind involving service by certified mail – simply by making an illegible mark and later denying that it is his or her signature. Clearly, the Legislature did not intend that the statute be so easily frustrated. All that matters is that it was indeed delivered and received by *someone* at the home. By ensuring proper delivery through the required method, the County satisfied due process.

Finally, any alleged deficiency is overcome by the Tupazes' complete failure to make an inquiry into the status of a foreclosure action. As noted in *Weigner supra*, "A second reason for tolerating the risk of non-receipt. . . . is (the plaintiffs') own conduct in failing to pay taxes. The well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of foreclosure. . . . A person in Weigner's position can reasonably be expected to know that foreclosure is imminent and to take the steps necessary to protect her interests." *Weigner*, *supra* at 651.

Obviously, ownership carries responsibilities and delinquent taxpayers themselves have an obligation to investigate whether a foreclosure proceeding has been commenced, as the inevitability of a foreclosure proceeding is so well-known. The Tupazes received

numerous prior letters and warnings. Although they were provided with ample opportunity to avoid a foreclosure, they took no steps to pay their back taxes or to inquire whether a foreclosure action had been instituted. To permit the Petitioners to recover under these circumstances would permit them to benefit from their own acquiescence and knowing disregard of the prior warnings that they had been provided.

CONCLUSION

As a result, the Respondents respectfully submit that this Court should deny Petitioners' request for Writ of Certiorari and that the well-reasoned Decision of the Second Circuit should be allowed to stand.

Dated: February 12, 2009

Respectfully submitted,

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